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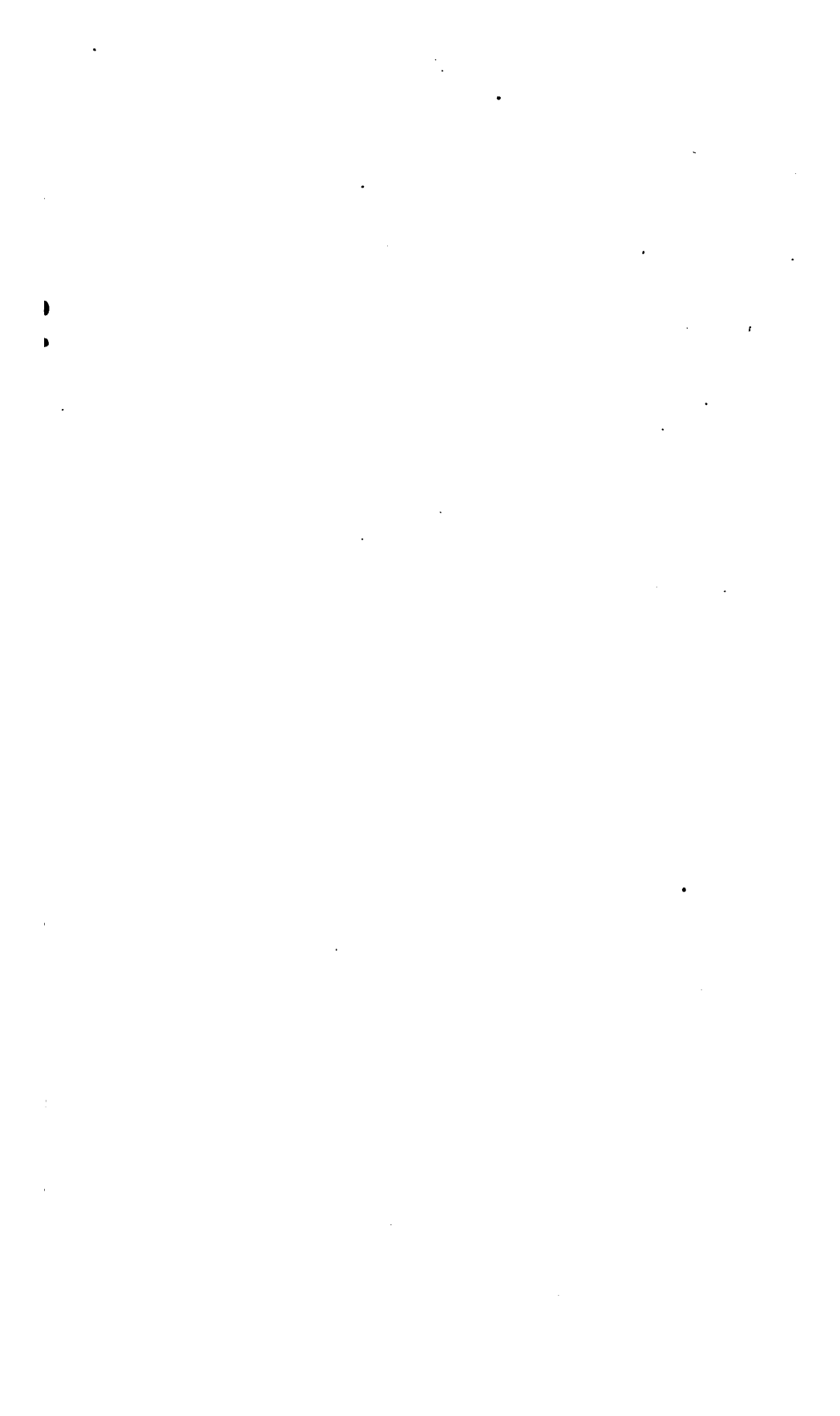


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OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

DURING THE YEARS

1838-9.

BY RETURN J. MEIGS.

NASHVILLE:

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1839.

Entered according to Act of Congress, in the year 1839, by RETURN J. MILES, in the
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JUDGES OF THE SUPREME COURT,

HONORABLE NATHAN GREEN,

„ **WILLIAM B. REESE,**

„ **WILLIAM B. TURLEY.**

ATTORNEY GENERAL, GEORGE S. YERGER, *Resigned Oct. 15, 1838.*

RETURN J. MEIGS, *Appointed Oct. 17, 1838.*



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ERRATA.

- Page 14, line 8, for "complicd" read "compiled,"
22, lines 26, 27, for "continuance" read "new trial,"
24, line 2, for "notice" read "motion,"
57, line 1, for "natural" read "mutual,"
82, line 2, for "juror's" read "jury's,"
188, line 10, for "sued" read "served,"
237, line 10, omit "same,"
237, line 12, for "repealing" read "repealed,"
317, line 23, for "assignor" read "assignee."

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION.
JACKSON, APRIL TERM, 1833.
BROWN vs. BALDRIDGE.

GRANT. *When it begins to exist—date—registration—relation.* The date of a grant, not that of its registration, designates its commencement, as a monument of title. Whenever registered, a grant relates to, and has full and complete existence, for all purposes, from its date, the registration not being intended to give it existence, but to preserve and perpetuate the evidences that it already exists, and being itself as good without as with a date. See *Fen. Polt vs. Pugh*, 1 Dev. & Bat. 216.

SAME. *Limitations.* Hence, the time of prescription is to be counted from the date, and not from the registration of the grant.

This action of ejectment, for 640 acres of land, was submitted to **BARRY**, Judge of the 11th, sitting for **HARRIS**, Judge of the 9th circuit, at October Term, 1837, of Weakley Circuit Court, upon an agreed case, in which it appeared—

That military warrant, 5071, dated December 6, 1797, had been issued by North Carolina to Martin Armstrong, requiring him to survey for Daniel Baldrige, a private 640 acres within the limits of the lands reserved by law for the officers and soldiers of the Continental line of the State; that the Board of Commissioners for West Tennessee had given Baldrige a certificate, dated July 10, 1822, that, by virtue of said warrant, he was entitled to enter 640 acres, by location 873, with any of the principal surveyors, south and west of the Congressional Reservation Line: that thereupon entry 725

Brown
v.
Baldrige.

had been made, dated December 24, 1822: that by an instrument under seal, dated March 7, 1823, Baldrige had, in consideration of love and affection given to his sons, William, the defendant, and Andrew, their heirs and assigns, all his right, &c. to said 640 acres, if located, and if not, then to the warrant, &c.; that the land had been surveyed in the name of Baldrige, the father, July 17, 1823; that the plat and certificate had been assigned by the Trustees of the University of North Carolina, by their attorney in fact, Samuel Dickens, to the lessor of the plaintiff, December 14, 1824; that in January 1825, the defendant, William Baldrige, had taken possession of the premises, claiming to hold them under the above gift from his father; that a patent founded upon the aforesaid entry had been issued by the State of Tennessee to the lessor of the plaintiff, dated January 1, 1827, which had been registered in the register's office of the Western District, May 29, 1827; that the defendant had continued his possession down to April 22, 1834, when this action was commenced. And the question was—

Whether land is, in legal contemplation, granted from the *date*, or from the *registration* of the grant? If from the date, then the plaintiff's right of action had accrued more, but if from the registration, then less than seven years before the commencement of the suit.

The defendant had judgment, from which the plaintiff prosecuted his appeal in error.

REESE J. delivered the opinion of the court.

April 4, 1838.

Seven years having intervened between the date of the grant, under which the defendant claims, and the institution of the suit, the statute of limitations constitutes a bar to the recovery of the plaintiff in the present case, if the date of the grant itself, and not the time of its registration shall designate the commencement of the grant as a muniment of title. And, at the threshold, we may remark, that the exclusive object in requiring a date to be annexed to all such instruments, is to establish and perpetuate the evidence of the fact as to *when* the instrument had its existence. The endorsement of the register in this case is necessary to show the fact of registration, but it would be as good without as with a date. In the thousands of instances in which grants have

been produced in courts of justice, it has never been ruled or intimated, that for the purpose of giving effect to the statute of limitations or for the purpose of determining the question of elder or younger title, the date, not of the grant, but of the registration of it must be resorted to. The registration of the grant is not intended to give it existence, but to preserve and perpetuate the evidence that it already exists. It is unnecessary, however, that we should in this case determine whether the registration be necessary to the validity of the grant, entertaining as we do no doubt whatever that the grant when registered relates to, and has full and complete existence for all purposes, from the date which it bears. This point, though not reported, was determined many years since in the case of *Peck's Lessee vs. Hanes*, when that case was a third time before the Supreme court. The principle has been settled in North Carolina, in several cases; and indeed, in the absence of all authority, the reason of the thing, if not the necessity of the case, would dictate the same conclusion.

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v.
Baldridge.

Let the Judgment be affirmed.

ROCHELL vs. BENSON, HUNT, & Co's. Lessee.

DEED Non-resident bargainor—probate—registration. How the deed of a non-resident bargainor may be proved, and the probate certified, so as to be admissible to registration, under the act of 1807, c. 85, § 3.

SAME. Irregular registration—effect of on title. If land be sold under execution, the title passes, as against the defendant and those claiming under him by conveyance subsequent to the judgment, notwithstanding any irregularity in the registration of his title deed. 3 Yerger, 171; 10 Yerger L.

SAME. Same—estoppel—vendor and purchaser. Though a conveyance whereby a vendor claims title to land, is irregularly admitted to registration, as upon an insufficient or not duly certified probate or acknowledgement, a purchaser from him is, nevertheless, estopped to deny his title, or to set up against him an outstanding title. 9 Johnson, 174.

FRAUDULENT CONVEYANCE. By judgment debtor—estoppel. One who buys land from a debtor, after judgment, cannot set up an outstanding title against a purchaser at a sale upon an execution of the judgment. 10 Johnson, 223.

Ejectment for 320 acres of land in Henry county, in the seventh section and fourth range. The premises had been granted, by the State of Tennessee, to the Trustees of the University of North Carolina, conveyed by them to John Fulton, by deed dated, January 31, 1834, sold under execu

Rochell tion against Fulton, and conveyed by the purchaser at that sale
 v. to the lessors of the plaintiff. And after the judgment against
Benson, Hunt him, Fulton conveyed them to Rochell, who, in this action,
 & Co's, Lessees. raised the question—whether Fulton had ever been so seized
 of the legal title as that the premises were liable to execution
 in his hands? And he contended that he had not,—because
 the deed from the Trustees of the University had not been so
 proved, and the probate so certified, as that it could be regis-
 tered;—and not being duly registered, it did not vest him with
 the legal title. The probate and certificate are copied in the
 opinion of the court.

The action was commenced on the 10th of June, 1836,
 and was tried at January Term, 1838, of Henry Circuit court,
 before READ, Judge of the 10th, sitting instead of HARRIS,
 Judge of the 9th circuit, and a jury of Henry.

The plaintiff read the grant to the Trustees, their deed to
 Fulton, records of several recoveries against Fulton, the sher-
 iff's returns of a sale under those recoveries, his deed to the
 purchasers at said sale, and their deed to the lessors; and proved
 that the person, on whom notice of the action had been
 served, was in possession of the premises at the date of the
 writ.

The defendant read a mortgage and an absolute deed from
 Fulton to himself, both of them of dates subsequent to the
 recovery against Fulton.

His Honor charged the jury, that the judgments against
 Fulton, the executions thereon, levies, sales and conveyances
 vested a good title in the lessors of the plaintiff, if they be-
 lieved the land was sufficiently identified in the sheriff's levy;*
 that after the rendition of the judgments against Fulton, no
 conveyance could be made, by him, that would defeat the lien
 thereof.

Verdict, guilty; motion for new trial discharged, and appeal
 in error.

TURLEY J. delivered the opinion of the court.

This is an action of ejectment, in which the plaintiffs claim
 title to the premises in dispute, by grant from the State of

April 5, 1832.

*The deeds described the beginning corner of the premises as standing 440
 poles north, and 284 poles west of a certain point. The levy represented it as
 standing 44 poles north, &c.

Tennessee to the University of North Carolina, bearing date, the 3rd day of December, 1822; a deed of bargain and sale from the University of North Carolina to John Fulton, bearing date the 31st January, 1834; a deed of bargain and sale, dated December, 23, 1834, from James C. Gainer, sheriff of Henry county, State of Tennessee, to Robert I. Moore, Foster Crutcher and Alexander Allison, made by virtue of a sale under executions, issued from the County court of Henry county, against James and John Fulton, upon judgments, rendered at the June Term, 1834, of said court, in favor of said Moore, Crutcher and Allison, and a deed of bargain and sale from Moore and Crutcher and Allison to Sylvanus E. Benson, Samuel Hunt and John Patterson, the lessors of the plaintiff, bearing date the 10th day of July, 1835.

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v.
Benson, Hunt
& Co's Lessee.

The defendant claims title by virtue of a deed of mortgage from John Fulton to himself, bearing date the 16th of July, 1834, and also by virtue of an absolute deed of bargain and sale from John Fulton, bearing date the 20th of August, 1835.

The deeds of mortgage and of conveyance from John Fulton to Robert Rochell, being subsequent in date to the rendition of the judgments in favor of Robert I. Moore and Foster G. Crutcher, communicate no title as against them or persons claiming under them. But it is said—that John Fulton had no title which was subject to execution; and that the plaintiff, having therefore, acquired no right, by virtue of the deed of conveyance from the sheriff of Henry county, is not entitled to a judgment against the defendant, who is protected by his possession.

This argument involves two propositions—first, whether John Fulton had a legal title to the property in dispute? and secondly, whether, if he had not, the defendant Rochell is in such a situation as to take advantage thereof? 1st. It is said that John Fulton had no legal title to the lands sued for, because the deed of conveyance, made to him by the University of North Carolina, was not proven as the law directs, and has, therefore, never been properly registered. The probate of this deed is in the words and figures following:

“Be it remembered that at the Supreme court of said State of North Carolina, begun and held on the last Monday of December, A. D. 1833, by and before the Hon. Thos. Ruffin, Chief Justice, and his associate Judges of the same court,

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v.
Benson, Hunt
& Co's. Lessee.

at the city of Raleigh, and continued, by adjournment from day to day, until this day, to wit: the 1st day of January, 1834, in the same term, the foregoing deed, from the Trustees of the University to John Fulton, being produced and exhibited, in open court, before the said Chief Justice and his associates, Charles Manly and William R. Hill, the subscribing witnesses to the said deed, appeared, and being duly sworn, proved the execution, in due form of law, of the said deed, which is by the court here ordered to be entered of record and certified. In testimony of which I, John L. Henderson, Clerk of said Supreme court, have hereunto set my name and the seal of the said court, the 31st of January, 1834.

State of North Carolina.

I, Thomas Ruffin, Chief Justice of the Supreme court of North Carolina, do hereby certify and make known, that John L. Henderson, whose signature is annexed to the foregoing certificate and attestation, is the Clerk of the Supreme court, and, as such, is keeper of the records thereof, and that his said attestation is in due form."

We are of opinion that this is a good and sufficient probate under the provisions of the 3rd section of the act of 1807, c. 85, which provides that "all deeds of conveyance for the transfer of lands, wherein the bargainor shall reside beyond the limits of this State, within any other State or Territory, shall be acknowledged by the bargainor, or the execution thereof be proven by two or more subscribing witnesses thereto, in some court of record, of some one of the States or Territories of the United States,—the evidence of which shall be the attestation of the clerk of such court, in which such acknowledgement or probate was made, under the seal of his office, and the attestation of the presiding Judge or Justice of said court, which probate or acknowledgement shall be endorsed by said clerk on the back of said deed, and shall entitle the deed to registration in the county where the land lies."

2. If this is not a good probate, is the defendant in such a situation as to take advantage of it? We think not, because he entered into possession of the land in controversy, claiming to hold it under John Fulton, by virtue of the deed of conveyance from him, which estops him from disputing his

title. The authorities are numerous upon this point. We shall be satisfied with a reference to two cases, decided by the Supreme court of the State of New York. In that of *Smith vs. Burtis & Woodward*, 9 Johnson, 174, it was held that when one enters, claiming as a tenant in common under the same title as that of the lessor, he admits the title of the lessor, so that neither he, nor those claiming under him, can set up such entry as adverse to the common title or injurious thereto. In the case of *Jackson vs. Bush*, 10 Johnson, 223, it was held that in an action of ejectment by a purchaser under a sheriff's sale against a person in possession under the debtor without title or collusively, the defendant cannot set up an outstanding title in a third person to defeat the recovery of such purchaser.

*Rockell
v.
Benson, Hunt
& Co's Lessees.*

We therefore are of opinion that there is no error in the judgment of the court below, and direct that it be affirmed.

TURNER vs. LUMBRICK.

PLEADING. *Parties—tenants in common.* One tenant in common may sue in ejectment or forcible entry and detainer without joining his co-tenant.

FORCIBLE ENTRY, &c., *Description of party's interest.* In an action of forcible entry and detainer, the complaint need not specify the plaintiff's estate in the premises, with technical accuracy. It must show that he had some estate, but need not show the precise quantity of it.

SAME. *What constitutes the injury?* Acts, not of violence or outrage upon the person or property, but tending to produce a breach of the peace, will constitute the injury.

PRACTICE. *Continuance.* It is not error to refuse a continuance, on an affidavit, stating the absence of witnesses summoned to prove the pendency of a prior suit, for the same cause, the plaintiff releasing that suit of record.

SAME. *Same.* Nor is it error to refuse a continuance on an affidavit stating the absence of witnesses summoned to support the character of the defendant's witnesses.

In forcible entry and detainer, the plaintiff's complaint was in the following words—"To James N. Barr, Esq. an acting Justice of the Peace for Henry county, Tennessee. I, Abraham Lumbrick, complain of Robert Turner and James Turner, of a forcible entry and detainer, made by them into my mill house, on the 23rd March, 1836. The mill house is situated on Oldtown creek, in the county of Henry, on the road leading from Paris to Dresden, and has been familiarly known as

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Turner's mill; and is situated on a parcel of land, sold by decree of the chancery court of Henry, and bought by Robert Hays, and bought of him by John R. Moore, John Clayton and William Lyon, and of them purchased by your complainant, and one Benjamin T. Bowden, and peaceably taken possession of by them long since. On this statement, I ask for a writ of forcible entry and detainer."

The process was issued, and on the trial, the defendants pleaded—"That there is now pending and undecided, before John D. Love and Allen Wade, two justices of the peace of Henry county, a proceeding by writ of forcible entry and detainer, for the identical same forcible entry and detainer, and between the same parties; and therefore they pray that the proceedings be quashed." Upon this plea, issue was joined, which was submitted to a jury, who found in these words—"verdict no suit pending, so say we all."

The evidence submitted to the jury was—that Lumbrick had had possession of the mill, from June 1835 until March 23, 1836, early in the morning of which day, the witness, Lumbrick's son, who was miller, on opening the mill, was followed by R. and J. Turner and two others; that one of the Turners claimed the mill, and told witness, that if he had any thing in the mill, he was at liberty to take it out; that if witness proceeded to grind, he should suffer for it; whereupon witness cursed him, and told him to take *himself* out; that witness then poured out half a bushel of wheat, and went to put it in the hopper, on which, Turner took off the hopper, and set it on the floor, and took the key out of the door; that witness then went to raise the gate to let the mill run, when Turner told him, if he raised a gate, or touched any thing in the mill, he would make him suffer for it; that these words were spoken in an angry, threatening manner; that Turner then replaced the hopper, poured out some corn, and proceeded to grind; and that Thomas Edwards was left by Turner as miller.

There was a verdict and judgment for Lumbrick before the justices, whereupon Turner applied to his Hon. Judge Cook for a *certiorari*, which was granted, and the proceedings were certified into the circuit court of Henry at September Term, 1836. At January term, 1838, the case came on to be tried

before Judge READ of the 10th, sitting for Judge HARRIS, of the 9th circuit.

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Turner offered an affidavit for a continuance, on account of the absence of Love and Wade, whom he had summoned to prove the matter of the plea in abatement. Whereupon the court ordered Lumbrick to elect which action he would proceed upon; and he, not admitting that there was another action pending for the same cause, elected, of record, to proceed in the present action, and released the defendants from all and every other action of forcible entry and detainer, except the present; and the cause was then, by consent, placed at the foot of the docket. When it was again reached, the defendants filed another affidavit for a continuance, on account of the absence of a witness summoned, by whom they expected to sustain the character of their witnesses. The court refusing the continuance the cause was tried; and Lumbrick offered to read to the jury, the evidence of the forcible entry and detainer as recorded by the justices, the defendants objecting to the evidence as incompetent, irrelevant and improper, but not to its being read from the justices' record. The objection being over-ruled, the evidence was submitted to the jury, as above recited and they found a verdict for the plaintiff below, and he had judgment, from which the defendants prosecuted this appeal in error.

FITZGERALD for the plaintiffs in error, insisted that the non-joinder of Bowden was fatal to the action, to which point he cited *Hart vs Fitzgerald*, 2 Mass. R. 509, and urged that the defendant in error was entitled to restitution of the whole land or none, and that it was incapable of severance; that the description of the premises, in the complaint, was insufficient, and cited *Clements vs. Clinton*, Martin and Yerger, 198; that the court ought to have continued the cause; and that the testimony did not make out a case of forcible entry and detainer, there being nothing in the conduct of the plaintiffs in error, calculated to excite fear.

W. S. WILLIAMS for the defendant in error said, as to the objection first raised by the plaintiff's counsel, it applies only to actions for chattels—as appears by reference to the case of

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Hart vs. Fitzgerald, 2 Mass. R. 509; because in such cases the cause of action is joint and joint only—but in case of real estate, one tenant in common can sue alone.

As to the second objection—the particularity in the description of the estate required under the English statutes, need not be observed, under our statute, because under the English statutes, different modes of proceeding are prescribed in reference to different estates. See 5 Richard 2, c. 7; 15 Richard 2, c. 2; 8 Henry 6, c. 9, and 21 James 1, c. 15. But our statute amalgamates the whole, and gives the writ of forcible entry and detainer, and the same proceeding as to all estates. It is not necessary even under the English statutes, to show what estate the plaintiff has expressly, but only by implication—3 Bac. Abr. 256—7. Much less is it necessary under our statute to show any particular estate, inasmuch as the right to recover is the same for all estates.

In this case, the plaintiff shows that he was the owner of the land,—it having been sold by decree in chancery and purchased by him of those claiming under that sale,—whence it appears that he had, at least, some estate.

The case in *Martin and Yerger* must have been decided upon the ground that the land was stated to have been part of an occupant tract, not showing whether, as such, it was authorized by law,—inasmuch as the opinion of the court cannot be otherwise sustained by the references in Bac. Abr.

But in this case, the description is much more full and satisfactory, than in the case of *Clements vs. Clinton*.

Lastly, the cause ought not to have been continued on the affidavits filed. Because, first, if the plaintiff below, had two actions of forcible entry and detainer pending at the same time and for the same cause, he had a right to elect, as he did in the present case; *Boucher vs. Williamson*, 1 Dana's Reports 328, and authorities there cited. Secondly, the other affidavit for the want of a witness to prove the general character of the other witnesses, makes out such a case in advance as did not occur on the trial—thus showing conclusively that the court below exercised a proper and legal discretion in refusing to continue for such cause. But suppose the state of circumstances anticipated by the defendant's counsel below,

had sprung up on the trial, a man's character—general character—ought to be, and must be known to more than one of his neighbors.

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The evidence makes out a case of forcible entry and detainer most conclusively; 9 Yerger, 93, *Davidson vs. Phillips: Childress & Wyley vs. Black & Wife*, 9 Yerger, 317.

GREEN J. delivered the opinion of the court.

In this cause several objections are taken to the proceedings of the plaintiff in error. First, it appears from the complaint, upon which the warrant for the forcible entry and detainer issued, that Lumbrick, who was plaintiff below, and one Bowden, were tenants in common of the mill, which it was charged had been forcibly entered and detained. It is therefore insisted that Bowden ought to have been joined in the suit. April 4.

This objection cannot be sustained. Any one tenant in common, may sue, though his co-tenants do not join in the action. And this may be done, either in ejectment or in forcible entry and detainer. Lumbrick had been put out of possession, and he might well maintain his action to regain it, without joining his co-tenant Bowden,—actions for personal property must be in the names of all the joint owners—but not so in real actions.

2. It is next insisted, that the complaint is not sufficiently descriptive of the estate of the plaintiff in the premises. The act of 1821, c. 14, § 7, requires the complaint to specify the lands, &c. forcibly entered and detained, and the estate of the plaintiff therein. The 4th section of the same act, gives the remedy provided by the act, in all cases, where the party complaining, has any estate, whether of freehold, or less than freehold. It cannot be material, therefore, in specifying the estate of the plaintiff, that it should be described with technical accuracy. True, it must be shown he has some estate; otherwise it will not appear that the entry was made injuriously to any one, 3 Bac. 256. But it is sufficient to set forth an estate within the statute, without describing the particular estate, 3 Bac. 257. Now the complaint

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in the present case, states, that the house, forcibly entered, "is situated upon a parcel of land sold by a decree of the chancery court of Henry, and bought by Robert Hays, and bought of him by Jno. R. Moore, Jno. Clayton and William Lyon, and of them purchased by your complainant, and one Benj T. Bowden." This specification of the estate, or title by which he claims the land, necessarily describes an estate that would be liable to sale by a decree of the court of chancery,—and as the plaintiff traces his title under such decree, it follows that he has an estate the statute will protect.

3. It is next insisted that the evidence does not show a case of forcible entry. We think it does. The defendants came to the mill, forbade the party in possession from grinding, or in any way using the mill, ordered him away, and in an angry manner told him, if he raised a gate, or touched any thing in the mill, he should suffer for it. To constitute a forcible entry under the statute, it is not necessary that violence and outrage upon person or property be resorted to, but if such acts are done, as show a breach of the peace may reasonably be apprehended, it is a forcible entry; *Childress & Wyley vs. Black & Wife*, 9 Yerg. 317. We think the facts above recited, from this record, constitute such a case.

4. The next question is, whether a continuance ought to have been granted. Upon this application there are two affidavits. The one sets forth, that there was pending another action of forcible entry and detainer for the same land. But the plaintiff having released, of record, all other actions of forcible entry and detainer, the court refused to continue the cause. In this there is no error. If there was another suit pending for the same cause of action, this release might have been pleaded as an effectual defence.

The other affidavit states, that a witness who had been summoned, was not at home, and unable to attend, and that by him the defendant expected to prove, that another of his witnesses had a good character. This was not sufficient ground for a continuance. The affidavit does not state, that there were not others, whose attendance could have been procured, by whom he could sustain his witness. In the nature of things this must have been so; if indeed, the witness' character was

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good,—for he could only enquire into his general character; and general character consists of the opinion generally entertained of a party by his acquaintances—and therefore could have been proven by many witnesses.

Upon the whole, there is no error in the record, and the judgment must be affirmed.

1. NOTE—On the subject of the plea of the *Pendency of a prior suit*, for the same cause, see the rules and distinctions clearly stated in Gould on Pleading, chapter 5, § 122 to 131.

2. NOTE—The remedy provided by the act of 1822, c. 14, was designed to protect the right to the use, enjoyment or occupation of lands, tenements or other possessions, 1 without reference to the ultimate right of property therein, 2 from that class of injuries, which, in that act, and in those ancient English statutes from which it was compiled, 3 are denominated—

- | | | | |
|--|--|---|--------------------|
| 1. <i>Forcible entry and detainer.</i>
Where the defendant enters upon and into premises, actually adversely held, 4, and detains them by any kind of violence what ever, done with force, strong hand, or weapons, to the tenants's. | House, | { By breaking open the doors, windows,, or other parts thereof, whether any person be in it or not. 5. | |
| | Person, | { By threatening to kill, maim, or beat him, or
By such words, circumstances or actions as have a natural tendency to excite fear or apprehension of danger. 6. | { 2, first clause. |
| | Goods, | { By putting them out of doors, or
By carrying them away. | |
| 2. <i>Forcible detainer.</i>
Where the defendant enters peaceably, and then turns the tenant out of possession. | { By force, or
By frightening him | { With threats, or
Other circumstances of terror | { 2, last clause. |
| 3. <i>Unlawful and forcible detainer.</i> Where the defendant enters lawfully or peaceably, and holds or keeps the premises. | { Unlawfully and
By any of the means mentioned in the case of forcible entry and detainer. | | { 3 |
| 4. <i>Unlawful detainer.</i> Where the defendant enters by contract, for a definite period, 7. | { As a tenant, or
By a tenant, by assignment of the term, or
From a tenant, by personal representation, or
Under a tenant, by subtenancy, or
By collusion with a tenant, | { And in either case, holds over wilfully and without force, 8, after demand of the possession, 9, and written notice, 10, from the landlord or the assignee of the remainder or reversion to deliver the same. | { 5 |

The action is commenced by a complaint in writing, addressed to a justice of the peace for the county in which the premises lie, signed by the party grieved, his agent or attorney, specifying—

1. The lands, tenements or other possessions, in reference to which the injury has been done, 12.
2. The specific injury complained of, as forcible entry and detainer, or forcible detainer, &c.
3. By whom and when done.

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4. The plaintiff's estate therein, 13.

And praying for the redress provided by the act of Assembly,

A summons to appear is thereupon issued to the defendant, which must be served upon him six days before the day of appearance, 14.

If he appear, he may plead, "not guilty," or if the fact be so, "that he hath had the uninterrupted occupation, or been in the quiet possession of the premises, for the space of three years together, immediately preceeding the complaint:" if the defendant fail to appear, the justices proceed as if he had appeared and pleaded, "not guilty," 15.

The issue is tried before two justices, of whom one must be the justice who issued the process, and who is to keep the record of the proceedings, which record is to be signed by all the justices trying the dispute, 16—and a jury of twelve elected out of a panel of twenty summoned by the sheriff, who may fill it out of the by-standers, if those summoned, or any of them, do not attend, or the panel, by challenges, of which each party has four peremptory, or otherwise should be deficient, 17.

If the defendant be found guilty, or his plea of possession be found against him, the justices enter a judgment and award a writ of restitution. But the writ does not issue till after the expiration of twenty days from the judgment, which period is allowed the defendant to remove the proceedings into the circuit court by *certiorari*, 18, in the petition for which, the merits only need be stated, and on the hearing of which there is a new trial of the facts, 19.

1. "*Lands, tenements or other possessions.*" These are the words of the statute 15 R. 2, c. 2. See the construction of them, Hawkins' Bk. 1, c. 64, § 31, *Edwards vs. Batts*, as to occupancies and lands of the United States, 5 Yerg. 441; 1829, c. 22; § 11; *Pettyjohn vs. Akers*, 6 Yerg. 448.

2. § 20.

3. 5 R. 2, St. 1, c. 8; 15 R. 2, c. 2; 4 H. 4, c. 8; 8 H. 6, c. 9; 23 H. 8, c. 14. See 31 Eliz. c. 11, which explains 8 H. 6, c. 9, and 21 Jac. 1, c. 15, which enables justices to give restitution in certain cases.

4. "*Adversely held.*" *Love vs. Marshall*, Martin & Yerger 255, 2d resolution; 9 Yerger 95—6.

5. *Davidson vs. Phillips*, 9 Yerger, 93, 96.

6. *Childress & Wyley vs. Black & Wife*, 9 Yerg. 317.

7. "*Definite period.*" *Love vs. Marshall*, Martin & Yerger, 255, 260.

8. *Trousdale vs. Darnell*, 6 Yerger, 431, 434.

9. 10. 11. *Love vs. Marshall*, Martin & Yerger 255, 260; *Manly vs. Rogers*, 5 Yerger, 215, 220.

12. *Description of premises.* *Clements vs. Clinton*, Martin & Yerger 198, 2d resolution.

13. *Clements vs. Clinton*, 2d resolution, Martin & Yerger, 200.

14. § 8, 9; *Clements vs. Clinton*, 4th resolution.

15. § 10. 20.

16. § 6, 25.

17. § 7, 22.

18. § 13; 1822, c. 35, § 2; *Clements vs. Clinton*, 5th resolution; *Earl vs. Rice*, 10 Yerger, 233.

19. *Love vs. Marshall*, Martin & Yerger, 255, 1st resolution, 258—"Merits alone," *Edwards vs. Batts*, 5 Yerger, 441, 3d point, 442—3.

LAWLER vs. HOWARD.

PRACTICE—*Amendment of justices record—entry of appeal.* Decided in this case, that a justice's omission to enter, and, in *Rogers v. Cochran*, 3 Yerger, 311, that his mistake in entering a party's prayer for, and the grant of appeal, may, on motion in the circuit court, be amended by the justice, by supplying or correcting the omitted or mistaken entry, by means of the recitals in the appeal bond. But the recitals *per se*, cannot be taken, by the court above, instead of the entry; *Cooley v. Julin*, 5 Yerger, 439. These amendments are within the spirit and meaning, though not within the words of the act of 1821, c 21, § 1.

Lawler sued Howard before a justice of the peace of Weakly, on the 14th of June, 1836, for damages for the breach of a contract. On the 4th of July following, the justice gave judgment for the defendant for costs. The plaintiff prayed an appeal to the circuit court of Weakly, which was granted, and he executed his bond for the appeal, which, as usual, recited that an appeal had been prayed and granted, but the justice omitted to enter the prayer for and grant of the appeal. At June term, 1837, of the circuit court, the defendant moved the court to strike the suit from the docket, because it did not appear that the appeal had been prayed for and granted. The plaintiff produced the justice and the appeal bond, and moved that the justice be permitted, in open court, so to amend the papers as to show that an appeal had been prayed for and granted, as recited in the condition of the bond. The court refused leave, and dismissed the suit, to which judgment the plaintiff excepted; filed his bill of exceptions, and prosecuted his appeal in error to the supreme court.

GREEN, J. delivered the opinion of the court.

This suit was commenced before a justice of the peace, who gave judgment against the plaintiff. When the cause came into the circuit court, the defendant moved the court to dismiss it from the docket, because there was no entry in the justice's record, showing that an appeal had been prayed and granted from the judgment of the justice of the peace. The plaintiff then produced the appeal bond, which recites that the plaintiff had prayed an appeal to the circuit court, and

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asked leave for the justice, who granted the appeal, to amend the papers, so as to show that an appeal had been prayed and granted. But the court refused to permit the amendment, and dismissed the suit, from which judgment this appeal in error is prosecuted.

The Act of 1821, c 21, § 1, provides, that when an appeal may be taken from the decision of a justice of the peace, "and exception shall be taken to the form of the entry made by such inferior jurisdiction, in granting the appeal, or to the sufficiency of the bail or security given on said appeal, or to the form of the bond, or that no bond has been taken, the court shall, from time to time, on application, allow the party making the same to supply any defect in the proceedings of the inferior jurisdiction, as though the same had been commenced in that court."

Under the authority of this act, the court decided in the case of *Rogers v Cochran*, 3 Yer. 311, that if the entry of the justice of the peace failed to show to what court the appeal was prayed, it might be amended, the recital in the appeal bond, specifying the court to which the appeal was taken. In that case the recital in the appeal bond was the only evidence by which the amendment could be made, and the recital here will as surely guide and direct what amendment should be made as in that case; although not within the express words of the act of 1821, yet we think this case comes within its spirit and meaning, and that the circuit court ought to have permitted the amendment to be made.

The case of *Cooley vs. Julin*, 5 Yer. 439, is not an authority against this conclusion, although it is said in the opinion, in that case, "that a recital in an appeal bond, will not, of itself, be proof of an appeal prayed and granted;" yet, in a subsequent part of the same opinion the court say, "Why did not Julin have the record amended, so as to show that both himself and Cooley had brought up the appeal?" From this case it is seen, that although the recital in the bond will not of itself give the court jurisdiction of the case as an appeal, yet it is sufficient to authorise an amendment of the record, so as to make it appear an appeal had been prayed and granted.

Let the judgment be reversed, and the cause be remanded, to be proceeded in.

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NEAL AND SHELTON vs. HENRY.

WATERCOURSE. *Riparian owners, their rights.* To cause the waters of a stream, by the erection of a dam or the like below a party's line, to overflow his grounds and springs, or thereby to create, near his residence, ponds of stagnant and offensive water, injurious to health, is a nuisance and an actionable injury.

This was an action on the case brought by Henry against Neal and Shelton, in the circuit court of Fayette, for a nuisance, produced by erecting a dam across a stream of water, called Muddy Creek, below plaintiff's land, whereby it was overflowed, and certain springs of water which were accustomed to be thereon were destroyed, and the waters of the stream became stagnant and impure, so that the plaintiff's family became unhealthy and sick and were put to great expense of physicians' bills, &c.

The defendant pleaded not guilty. The cause was tried at September term, 1837, before Judge READ, of the tenth circuit.

The plaintiff below proved, that the dam caused a part of his bottom land to be overflowed, especially by swells of the stream; that the water was backed the distance of two miles, at common stages of water, through the whole extent of the plaintiff's land, leaving a part fit for a small settlement on the opposite side from his dwelling; that there had been two springs fit for use, near to, but above the water's edge, at low water, capable of being raised much higher, by gums, which are covered by the dam at all seasons and wholly useless; that a large branch running south of his house some 600 yards, and nearly parallel with his south boundary, is backed up at all seasons, beyond, but not on his land south of him; that both the creek and branches, at times in the summer season, smell offensively, and are stagnant, and occasionally covered with a filthy unhealthy scum; that plain-

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Henry. tiff resided at the place in question two or three years before the dam was built, and made permanent improvements for a residence, his mansion being three-fourths of a mile east of Muddy Creek; that the value of his land is lessened by the dam; that some persons would not purchase a place so situated for fear of the disease which such a pond might generate; that there had been a crossing of the creek on plaintiff's land, useful to give him access to his land on the opposite side, which is obstructed by the back water; and that the dam had been constructed for an eight feet head. The plaintiff also produced and read the record of a former recovery for the same nuisance.

The defendants proved by several witnesses, that the plaintiff's land was as much overflowed before as since the building of the dam; that he had had more sickness in his family before than since, and not more than common beyond the influence of the pond; that five or six years ago, the surrounding country was very sparsely settled, that within three or four years it had been rapidly and very thickly settled, and much clearing of land and deadening of timber had been done in the neighborhood; that plaintiff's bottom land was worth but little, being cold and wet, with only here and there narrow strips of good land, too little to be fit for cultivation; that it was worth more since the building of the mill than before, on account of the facility of preparing the timber for market, in which the chief value of the land consisted; that the pond overflowed very little of the land, and that only occasionally, in a cold wet place, at the head of two sloughs; that the springs mentioned are in the bed of the creek, three or four inches above the low water mark of dry seasons, and were of no value to plaintiff, and had never been used by him, and were covered by the creek except in the lowest stage of the water, and were then covered by any little swells; that Muddy Creek was a full, sluggish stream, choked with fallen timber and drift, that in the opinion of plaintiff's family physician, the pond had not affected the healthiness of his residence, but would be likely to do so if the growing timber intervening between the house and pond were to be removed; that stagnant water on the south of a dwelling was more

likely to produce disease than on the north; that the creek could be as easily bridged since, as before the raising of the pond; that the land of plaintiff on the west side of the creek could not be used by plaintiff without a bridge, though the pond were not there; and that the plaintiff never had in fact used the land on that side. This was all the testimony.

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His Honor charged the jury that every man must use his own property, so as not to injure that of his neighbor; that any building or erection, which, owing to its contiguity, is a continued injury to the health of another, having a prior occupancy, and which abridges the enjoyment of his property, is a nuisance for which the injured party has a right of action, if it be not removed upon request; that the law is the same in a new, as in an old settled country; that the measure of damages for such injury was whatever the jury might think reasonable; that no man has a right to convert the property of another to his own use, without his consent, as by diverting the water on his own land so as to overflow the land of another, creating thereby a mill dam, or head of water on another's land for his own use; that the previous verdict and judgment were *prima facie* evidence of the plaintiff's right to recover for a continuance of the wrong; that as the main object of the law was the removal of the cause of complaint, in an action for a continuance of the nuisance, the jury might, at their discretion, increase the damages so as to produce that result; but that the effect of such *prima facie* evidence might be removed by other evidence, of which they were to judge.

The jury found the defendant guilty, and assessed the plaintiff's damages to \$115. The defendant moved for a new trial, which was refused, and he thereupon filed his bill of exceptions, setting forth the above statement of the case, and prayed an appeal in error.

H. G. SMITH, for Neal and Shelton, to show the limitations to which the maxim, *sic utere tuo, ut alienum non lædas*, is subject, in its application to such cases as this, cited *Platt vs. Johnson*, 15 Johnson, 213: and *Panton vs. Holland*, 17 *Id.* 92, and Com. Dig. Action on the case for Nuisance, C., and he insisted that it appeared from these autho-

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rities, that the maxim does not operate upon cases where the cautious and prudent exercise of a lawful right by one person occasions damage to another; that in an unsettled country, a man who purchases and improves a building site contiguous to a mill site, cannot complain if the owner of the latter apply it to its appropriate purpose, in a reasonable manner and without malice or negligence; and that in such country, if a man purchase real estate, and improve it by building a dwelling house thereon, in contemplation of law, he purchases with reference to a change of the condition of the country, and to the uses to which subsequent neighboring purchases will reasonably put their property. 12 Mass. 220.

JOHN BROWN, for the defendant in error, said that the verdict of the jury was sustained by the proof; that there having been a previous verdict and judgment for this same cause of action, the jury might have found exemplary damages, which however they had not done, 12 Petersdorff, 799, note; that the finding of the jury was consistent with the charge of the court, which itself was sustained by the law, 2 Starkie's Ev. 541: 12 Petersdorff, 791, 799, note: and that this court would not disturb the verdict, which pronounces that the facts proved amount to a nuisance, though in its opinion they might not, 12 Petersdorff, 794: since, in truth, the question submitted to the jury was one purely of facts.

REESE, J., delivered the opinion of the court.

April 9.

The defendant in error brought this suit to recover damages for the continuance of an alleged nuisance, damages having been recovered by him in a former action, upon the same ground. He obtained a verdict, and a judgment thereon was rendered in his behalf; to reverse which the plaintiffs in error have prosecuted an appeal to this court. The nuisance alleged is, that a mill dam of the plaintiffs' in error, by them erected and kept up, on a stream below the residence of the defendant in error, is so located as to overflow the grounds of the defendant in error; to cover up and render useless certain springs of fresh water, and to create in the neighborhood of

his residence, ponds of stagnant water, injurious to the health of his family.

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Evidence was heard by the jury tending to establish the truth of these several allegations.

It is insisted here, that the construction of a mill, upon a site adapted to such an end, is an appropriate use of the owner's property, in the enjoyment of which he cannot be restrained by his neighbor, upon the ground that such use is inconsistent with the proper use and enjoyment, by the latter of his property; and that therefore the accumulation, by means of a dam, of a large pond of stagnant water, near the premises of another, affecting the health of his family, so as to render his dwelling not safely habitable, does not constitute an injury, for which he can have redress by action in a court of justice.

To this proposition we cannot assent. Every individual, indeed, has a right to make the most profitable use of that which is his own, so that he does not injure others in the enjoyment of what is theirs. And it is conceded also, that if one, in the cautious and prudent use of property, in a manner appropriated to its nature and character, produce some annoyance to his neighbors, such person, though sustaining some loss, has suffered no legal injury which can be redressed. But to dam up a stream, and create pools of stagnant water upon, or near to, the premises of another, poisoning the atmosphere, generating disease, and impairing the enjoyment of that most valuable of absolute rights, health, cannot be called the cautious and prudent use of property in an appropriate manner. To do so is to violate the injunction, *sic utere tuo ut alienum non ledas*.

Of the facts establishing the nuisance, and of the extent of the injury, the jury are the proper judges. There seems to be no want of evidence to sustain their verdict, nor any error in the charge of the court, and the judgment, therefore, will be affirmed.

NOTE.—For a very complete and satisfactory collection and classification of the cases upon this branch of the law, which is becoming every day more and more important in this country, see Angell on Watercourses. The fourth chapter treats of the particular branch of the subject considered in this case.

Neal & Shelton *As to the relative rights of the proprietors of mill sites upon the same stream,*
v. see *Bigelow vs. Newell*, 10 Pickering, 348. Whether a lower proprietor on a
 Henry. stream may raise a dam, so as to obliterate and submerge a fall higher up, and
 thereby prevent the erection of a mill on a suitable site? is a question which is
 left undetermined. The case decides that where an upper proprietor has actu-
 ally built, or is building a mill thereon, a lower proprietor cannot, without a
 right acquired by grant, prescription, or actual use, erect a new dam, or raise
 an old one, so as to destroy the upper mill privilege, simply under a liability to
 pay damages. 10 Pick. 357.

The facts in this case are stated at large with a view of showing that the case
 is an authority, that merely overflowing the land of an upper proprietor, is an
 actionable injury, since it will be seen that the evidence is pretty equally bal-
 anced as to the loss or damage occasioned the plaintiff by the inundation.—Re-
 porter.

POTTER vs. COWARD.

SALE. *When a sale of chattels is complete.* A sale of chattels is complete so
 soon as both parties have agreed to the terms. So soon as the vendee says,
 "I will pay the price demanded," and the vendor says, "I will receive it,"
 the vendee has a right to demand the thing sold; the vendor to demand the
 consideration, and they are mutually entitled, the one to his action for the
 thing, the other to his action for the money.

SAME. *Sheriff's sale the same.* *Shaw v. Smith*, 9 Yer. 97, decides that what-
 ever property is vested in the sheriff by his levy on a chattel, passes to the
 bidder at his sale, so soon as the hammer is down.

PRACTICE. *Continuance newly discovered testimony.* If an affidavit for a
 continuance, on the ground of newly discovered evidence, shows, that before
 the trial, due diligence was used to procure evidence of the fact expected to
 be proved by the newly discovered evidence, and the fact is material, it is
 error to refuse a new trial thereupon.

On the 30th of January, 1835, a public sale of sundry
 negroes, belonging to the estate of C. and M. G. Sewell,
 was had under an order of the county court of Tipton, au-
 thorising and directing the administrator to make it, for cash
 in hand. The defendant was the highest and best bidder for
 four negroes, who were struck off to him by the auctioneer.
 One of them, named Lewis, was struck off at the price of
 \$680. The bidding was not completed till late in the day;
 and, about sundown, the administrator said, in the hearing of
 the defendant, and of other purchasers of negroes, that it
 was then too late to proceed with the business, but that they
 must attend the next morning, at the place of sale, and finish

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or close it. None of the negroes bid off by the defendant were proven to have been delivered to him, on the day of sale, nor did he pay any of the purchase money on that day. The defendant assented to the administrator's proposition, to attend next morning at the place of sale, and finish the business, and left for the night. During the night Lewis died suddenly, two miles from the place of sale, in the direction of the defendant's house. Next morning defendant attended at the place of sale, and then paid for, and received the surviving negroes bid for by him, but refused to pay for Lewis, on account of his having died between the bidding and the time fixed for the payment and delivery. Lewis was in his usual health, on the day of the sale, and was healthy.

The administrator thereupon sued the defendant in Tipton county court, on the 9th of June, 1835, in *assumpsit*. The declaration continued three counts, the first of which alleged the special circumstances, and that after the defendant became the highest bidder, and was declared the purchaser of the negro, he was legally possessed of him, and in consideration, &c. The second count was *indebitatus assumpsit* for a negro sold and delivered; the third, a *quantum valebat*. The defendant pleaded *non assumpsit*, and issue was thereupon joined. The cause was tried at October term, 1836, of Tipton county court, before his Honor Judge Read and a jury. The evidence submitted to the jury were the facts above stated. His honor charged the jury:—

That the party in whom the right of property in the negro was at his death, must bear the loss of him; that in order to produce a change of ownership in a chattel, there must be a delivery actually or constructively. Actually, as when the chattel is received by the vendee, or is tendered by the vendor; constructively, as if a man contracts for a thing not present, but pays or satisfies the seller; that if the acts to be done are simultaneous, as in a cash sale, in order to bind the purchaser, the property must be delivered or tendered; and, in like manner, to bind the vendor, the money must be paid or tendered; that in either case, the party might waive such right, and either pay without receiving the property, or deliver without receiving the price.

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The jury found the issue for the defendant. The plaintiff moved for a new trial, and in support of his notice produced an affidavit of Bryan Holloway and James E. Munford, stating facts which came to the plaintiff's knowledge after the trial, tending to show that the defendant exercised certain acts of ownership over Lewis, on the evening of the sale, importing that he considered the property to have passed to himself. The new trial was refused, whereupon the plaintiff filed his bill of exceptions, which stated the above facts, and prayed this appeal in nature of a writ of error.

W. H. LOVING, for the plaintiff, insisted, 1. That in case of a sale of personal property, at auction, so soon as the property is struck off to the bidder, the right of property is vested in him. And if the subject of the contract die, or be destroyed, at any moment afterwards, it is his loss, provided the vendor did not withhold the possession against the will and demand of the vendee. But the vendee has no right to the possession, until he has performed, or offered to perform the condition of the sale; and when he has so done, he is entitled not only to the possession, but also to his action. And he cited to this purpose, Chitty on Contracts, 110, top page; Noy's Maxims, 68.

2. That a new trial will be granted, on the ground of newly discovered evidence, if it appear to be material and to have been discovered since the trial, and that no laches are imputable to the party; and he cited *Vandervoort vs. Smith*, 2 Caine's Cases, 155; *Hollingsworth vs. Napier*, 3 Caine's Cases, 182; *Palmer vs. Mulligan*, *Id.* 307; 15 Johnson, 293; 18 Johnson, 489. He said the court would decide upon the materiality of the evidence, and grant or deny the new trial accordingly; *Halsey vs. Watson*, 1 Caine's Cases, 24; *Kendrick vs. Delafield*, 2 Caine's Cases, 67.

J. HASKELL, with whom were *Chalmers* and *McClusahan*, for the defendant, admitted, that merely by the bargain, the property in goods may be altered; Chitty on Contracts, 110, 111, and notes; Noy's Maxims, 88: but contended, that although a contract for the sale of goods be complete and binding in other respects, the property in them remains in the vendor, and at his risk, and he may retain

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them on the vendee's insolvency, if any material act remains to be done before delivery, as to ascertain or distinguish the quantity or price, Chitty on Contracts, 112; *Pleasants vs. Pndleton*, 6 Randolph, 473, where the doctrine is elaborately discussed; 2 Starkie's Ev. 634, 638. In this case the negro was to be delivered and the money paid on the day after the bidding.

2. Upon the other point they said, that a new trial is never granted on the ground that a party did not give evidence which he might have produced, 1 Wilson, 98; *Cook vs. Berry*; nor will the court, on a motion for a new trial, hear an affidavit of any facts which might have been brought forward at *nisi prius*, *Hope vs. Atkins*, 1 Price, 143; 1 Eng. Exch. R. 67.

TURLEY, J., delivered the opinion of the court.

April 9.

Two questions are presented for consideration in this case.

1. Did the court below err in refusing to grant a new trial, because of misdirection to the jury? The plaintiff had exposed to public sale a lot of negroes for cash; at the sale the defendant was the highest and best bidder, and the negroes were struck off to him by the auctioneer who cried the sale. One of the negroes, named Lewis, was bought at the price of \$ 680. None of the negroes were proven to have been delivered on the day of sale, nor that any part of the purchase money was paid. During the ensuing night Lewis died suddenly, and the defendant refused to pay the price bid for him.

On the trial the court charged the jury, "That in this case it was necessary to prove a delivery of the negro, actually or constructively, actually, as where the property is received by the vendee, or tendered by the vendor; constructively, as if a man contracts for property not present, but pays the consideration. That if there had been no delivery, or tender of the negroes, nor possession taken by the defendant, they would find for the defendant, otherwise for the plaintiff." This charge is erroneous, because it asserts that there can be no binding sale until there has been either a delivery or tender of the property sold, or until the defendant takes it into

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possession; and, as consequent thereon, that if the property should be suddenly destroyed before either of these things are done, that it is the loss of the vendor and not of the vendee.

It is not the delivery or tender of the property, nor the payment or tender of the purchase money, which constitutes a sale. The sale is good and complete so soon as both parties have agreed to the terms; that is, so soon as the vendee says, "I will pay the price demanded," and the vendor says, "I will receive it," the rights of both are instantly fixed. The vendee has a right to demand the thing sold immediately, but must pay the consideration. The vendor the right to demand the consideration money, but must deliver the property. If the vendee tender the purchase money and demand the property, he may maintain *detinue* or *trover* if the delivery be refused. If the vendor tender the delivery of the property, and demand his purchase money, he may have his action of debt or *assumpsit*, if it be refused. This shows most clearly that it is the contract of sale, which creates their mutual rights, and not the things to be done by the parties afterwards; for if it were not so, no tender of money by the vendee could give him the right to the property of the vendor, nor any tender of property by the vendor a right to the money of the vendee. It being the contract of sale then which changes the right to the possession of the property; it necessarily follows, that the right to the possession is changed from the moment the contract is made, and that any loss or injury to the property, after that period of time, is the loss of the vendee, whether this loss be partial or total. If the negro in dispute had lost a limb after the sale and before the delivery, no one would have doubted that it was the loss of the vendee, because a delivery could still be made; but inasmuch as he died, so that no delivery could be made, a different rule of construction is asked, though, as we think, without reason.

In the case of *Shaw vs. Smith*, 9 Yer. 97; this court has said, in relation to rights acquired under a sheriff's sale, "that the contract was complete, so soon as the negroes were

struck off to the plaintiff as the highest bidder. He thereby acquired from the sheriff all the property in the negroes, which had existed in the defendant in the execution at the time of the levy, and in consideration thereof he was bound to pay the price he had bid." This is conclusive upon the point under consideration. We therefore think that the court erred in refusing to grant a new trial on the first proposition.

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2. Did the court err in refusing to grant a new trial upon the newly discovered testimony as set forth in the affidavits of *Bryan Holloway* and *James E. Munford*? The testimony was material according to the view taken of the case by the court below; it proved a possession of the negro in dispute by the defendant after the sale: the testimony was discovered after the trial, and the affidavit of Munford, the attorney, shows that exertion had been made before the trial to procure such testimony, but without success. There is no want of requisite diligence on the part of the plaintiff so far as we have been able to see. We think that a new trial ought be granted also for this cause.

The judgment will be reversed and the cause remanded for a new trial.

BANKS, *et al.* vs. THOMAS.

FRAUDULENT CONVEYANCE. *Sale of slaves.* Under the acts of 1784, c 10, § 7, 1789, c 59, § 2, and 1831, ch. 90, § 1, a sale of slaves, though accompanied with delivery to the vendee, is not good against the vendor's creditors, without a bill of sale registered.

SAME. *Statutes—sale of slaves—registration.* Upon the construction of the two first of these acts, the utmost that has been decided, in North Carolina and Tennessee, is, that as between the parties, a sale of a slave, accompanied with possession in the vendee, is good without a bill of sale. *Douglass v. Morford*, 8 Yer. 373, *Payne v. Lassiter*, 10 Yer. 507, recognized.

SAME. *Void and voidable.* A conveyance in fraud of creditors is not merely voidable at the option of creditors, but is absolutely void as though it never existed, and is incapable of confirmation. And though good as between the parties, it is to be treated when those, as to whom it is void, are contesting it, as though it were void for every purpose.

SAME. *Exception.* The only exception to the generality of these rules is that which is recognised in *Floyd v. Goodwin*, 8 Yer. 484, namely, that sales made by public officers, under process of law, are not within the purview of these acts.

By bill of sale, purporting to have been made on the 12th of March, 1832, George C. Simons conveyed two negroes to his brother, John Simons, to whom possession of them was then delivered. The latter sold and conveyed them, by bill of sale, dated October 22, 1833, to Ezekiel Thomas, to whom the possession was likewise delivered. Between the 3d of May, 1832, and the 12th of July, 1834, several judgments were recovered against George C. Simons, by the plaintiffs in error, Murray and Crockett, amounting to nearly five hundred dollars. Writs of *fi. fa.*, issued upon these judgments, were levied between the 16th and 21st of February, 1835, upon the negroes, by the plaintiff in error, Banks, who was sheriff of Carroll, and who, after due advertisement, sold them to Murray for five hundred and fifty dollars.

Thomas thereupon, namely, March 10, 1835, sued Banks, Murray and Crockett *in trover*, in the circuit court of Carroll, for this conversion of the negroes. On the 12th of August, 1836, he caused the bill of sale from John Simons to himself to be proved before the clerk of the county court of Carroll, and to be registered on the same day. The action was tried at July Term, 1837, before Judge HARRIS, of the ninth circuit, and a jury of Carroll.

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The defendant in error, on the trial, read the bills of sale proved that the sale from George C. Simons to John was unconditional, that the possession was delivered at the time of the sale, and that it continued in him till he sold to Thomas, to whom they were then delivered, and in whose possession they had remained, until levied upon by Banks; that at the time of the sale by G. C. to J. Simons, no incumbrance on the slaves was known; and, by one of the witnesses to the bill of sale to him, he proved its execution, and the delivery of the slaves to him by John Simons; that after the sale by G. C. to J. Simons, Murray, one of the plaintiffs in error, requested John Simons to pay him the purchase money which he was to give his brother for the slaves, in discharge of his demands against George C. Simons, and that John Simons agreed to, and did pay him twenty dollars, part of the purchase money.

The court charged the jury, that it required that both parties to a bill of sale should have acted fraudulently, to make it void; that a sale for a valuable consideration, accompanied by delivery of the property was a good and valid conveyance of the property sold, and would enable the purchaser to hold it against the creditors of the vendor; that if Murray knew all the facts, in relation to the sale from George C. to John Simons, and by his agreement ratified it, and received all, or a part of the purchase money, he could not insist that it was fraudulent.

The jury found the plaintiffs in error guilty of the conversion, and assessed the damages to \$801 50 cents. They moved for a new trial, which was refused, and they thereupon presented their bill of exceptions, in which the facts are stated as above, and appealed in error.

FITZGERALD, for the plaintiffs in error, insisted, that his Honor, the circuit judge, was mistaken in supposing that it required both parties to have acted fraudulently to make the transaction between them void for fraud; and he cited Roberts on Fraudulent Conveyances, 547, &c. in notes; Sheppard's Touchstone, 66, *Hildreth vs. Sands*, 2 J. C. R. 35: that the charge was also erroneous in relation to the effect of the delivery of the negroes from the debtor to his vendee,

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the case of *Douglass vs. Morford*, 8 Yer. 373, having decided that without a bill of sale registered, the sale is void as against the grantor's creditors and purchasers from him: and lastly, that in this case the bill of sale had not been so registered as to defeat the lien of the judgments and executions of the plaintiffs in error.

A. W. O. TOTTEN, for the defendant in error, contended, that in the absence of fraud, a sale of slaves, by parol or by deed not registered, is good and valid when possession accompanies the sale, to which purpose he cited *Caines & Wife vs. Marley*, 2 Yer. 582; *Arrington vs. Arrington*, 1 Haywood, 1: 2 Haywood, 62, 67, 87; *Morgan vs. Elam*, 4 Yer. 449; *Davis vs. Mitchell*, 5 Yer. 282; *Williams vs. Walton*, 8 Yer. 301: Hawk's Digest, 372; *Floyd vs. Goodwin*, 8 Yer. 494, and *Shaw vs. Smith*, 9 Yer. 97: that the validity of the title depends not on the registration of the deed, for if fraudulent, it is void as to creditors even though registered, and the converse of the proposition must also be true, that in the absence of fraud, the gift or sale is good without the registration of the deed; that as registration does not pass, so it ought not to be allowed to affect the title if omitted; that the effect of registration is simply to give notice of the change of property or right, and to remove the presumption of fraud which, at common law, attaches where the right and the possession are in different persons, 5 Johnson, 258; 8 Johnson, 446: that as to real estate, it is the registration, the substitute for *livery of seisin*, which passes the title, not so of personalty, as to which delivery of possession is still necessary, as at common law, to pass the title, that alone, and not the deed evidencing the sale, having that effect; that the cases which sustain the validity of official sales without bills of sale are not grounded upon any exception in the statutes, but upon their publicity and their usual exemption from fraud, by which they, as well as private sales are equally vitiated, so that it is not the want of registration, but fraud, which enables creditors to overthrow the transaction, and the question is, was the sale, in this case, *bona fide*? and if the first sale from George to John Simons was not, yet that from the latter to Thomas was, and beyond that, the

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plaintiffs in error cannot push the inquiry into the title, *Bartlett vs. Henry*, 10 Johnson, 185; 14 Johnson, 407; 1 J. C. R. 213; 1 Vernon, 44: that even the sale from George to John Simons cannot be attacked by these creditors, by one of whom part of the purchase money was received, and who cannot therefore pretend want of notice, 4 Kent's Com. 163, 164; *Le Neve vs. Le Neve*, 3 Atkins, 646; 1 Vesey, 64: 10 Johnson, 457; 4 Yer. 428; *Anderson vs. Anderson*, 2 Call, 206; 16 Ves. 419: that, at most, the sale from George to John Simons was only voidable, *Anderson vs. Roberts*, 18 J. R., 505; 10 *Id.* 185, and was therefore capable of confirmation by the creditors, *Wheaton vs. East*, 5 Yer. 41; 7 Bac. Ab. 68, who might, at least, waive the fraud, 9 B. and C. 59, note: that the defendant in error, having purchased without notice of the claims of creditors, ought to be treated as a *bona fide* purchaser without notice, *Anderson vs. Roberts*, 18 Johnson, 521, 528; 9 Ves. 190; 1 Mad. Ch. 217; 3 J. C. R. 147, 345; 10 Johnson, 185: 1 J. C. R. 219; and finally, that a new trial would not be granted for misdirection of the judge as to the register acts, if it appear that the verdict was correct, 2 Harrison's Digest, 1525.

GREEN J. delivered the opinion of the court.

April 9.

This is an action of *trover* and conversion, brought by Thomas, the defendant in error, to recover several negro slaves. These slaves were the property of George C. Simons, and were by him conveyed to John Simons on the 12th of March, 1832, and by him conveyed to the defendant in error, on the 22nd of October, 1833. The bill of sale from George C. to John Simons, has never been proven and registered. The negroes were levied upon on the 16th of February, 1835, by virtue of executions in favor of the plaintiffs in error, and several other persons, against George C. Simons, and sold as his property to Robert Murray, one of the plaintiffs in error. Many of these debts existed, and some of the judgments had been obtained, previously to the execution of the bill of sale, from George to John Simons. The court charged the jury, that a sale of slaves, for a val-

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uable consideration, accompanied by delivery of possession, was a good and valid conveyance of the property, and would enable the purchaser to hold it, against the creditors of the vendor. The jury found a verdict for the plaintiff below, and the defendants appealed to this court.

The court erred, in its charge to the jury:—The act of 1784, c 10, § 7, provides, that “all sales of slaves shall be in writing, attested by at least two witnesses, or otherwise shall not be deemed valid.” By the act of 1789, c 59, § 2, it is provided, that “all bills of sale and deeds of gift of whatsoever nature, shall within twelve months after the making thereof, be proved in due form and recorded; also, all bills of sale and deeds of gift not authenticated in manner by this act directed, shall be void and of no force.” By the act of 1831, c 90, § 1, bills of sale for slaves, are required to be registered. By the sixth section, it is provided, that they shall take effect only from the time registered; and the 12th section makes them void, as to existing or subsequent creditors, unless registered as the act directs.

With these acts of assembly before us, it is difficult to perceive how any one could suppose a sale of slaves would be good, as against creditors, without a bill of sale registered. Such a decision has never been made since the passage of the act of 1784, by the supreme court of this state, or the State of North Carolina. It is true the course of the decisions in North Carolina, sanctioned and followed in this state, restricts the application of the general expressions in the acts of 1784 and 1789, and holds, that as between the parties, a sale of a slave accompanied with possession in the vendee, is good, though there be no bill of sale. This is as far as any case has ever gone, except the case of *Floyd vs. Goodwin*, 8 Yerger, 484, in which the court determined, that these acts have no application to sales under process of law by public officers. But in the case of *Douglass vs. Morford*, 8 Yer. 373, a sale of a slave, accompanied with possession, was held to be void, as against a creditor, there being no bill of sale registered. This case was recognised as the settled law, at the last term of this court at Nashville, in the case of *Payne vs. Lassiter*, 10 Yer. 507.

As in this case there was produced no registered bill of sale from George C. to John Simons, the title to the slaves, so far as creditors are concerned, did not pass out of George C. Simons, by the sale to John, and consequently the defendant in error, Thomas, acquired no title by his purchase from John Simons.

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But it is said the deed was only voidable, and that the sale to John Simons was confirmed by Murray, one of the execution creditors of George C. This is not the description of voidable deeds, which is subject to confirmation by the act of the party who may avoid it. The cases referred to are those, where the party making the deed may set it aside or confirm it as he may choose. In this case the sale is said to be voidable only, because for some purposes it is good, it being obligatory upon the parties. So are sales made to defrauded creditors good between the parties, and therefore only voidable. But in all these cases the sales are absolutely void, so far as creditors are concerned, and may be treated as though they had never existed. Such sale is to be treated where the parties, as to whom it is void, are contesting it, as though it were void for every purpose.

The judgment must be reversed, and the cause remanded, to be determined upon the principles stated in this opinion.

ESTES vs. KYLE.

INTERNATIONAL LAW. *Conflict—limitations.* The statute of limitations of the state in whose courts a suit is prosecuted, must prevail in all actions.

SAME. *Constitutional law.* The federal constitution, art. 4, § 1, relative to the faith and credit to be given to the judicial proceedings, &c. of each state in the others, and the act of Congress of 1790, c. 11—1 Story's Laws, 93, Gordon's Digest, art. 638—giving to those proceedings such faith and credit, in every court in the union as they have in the state whence taken, do not change the above rule of international law,—nor impose upon the tribunals of the state in which a suit may be prosecuted thereon, all defences arising upon matters *ex post facto*, and affecting the remedy merely to which they would have been subject, if sued in the state whence they were taken. See Story's Confli. § 575 to 583, Comm. on Const. § 1297 to 1307.

SAME. *Same.* The general language in *Mills vs. Duryee*, 2 Cond. R. 578, and *Hampton vs. McConnell*, 4 Id. 243—"that whatever pleas would be good to a suit brought upon a judgment in the state where it was originally rendered, and none others can be pleaded in any other court in the United States"—is to be understood of pleas, affecting the validity and conclusive effects of judgments, as evidence, not of pleas, affecting only the remedy.

Estes and another executed their bill single to Kyle on the 12th of November, 1817, for fourteen hundred and sixty four dollars and seventy-nine cents, payable twelve months after date. On the 27th of September, 1819, in the superior court of Pittsylvania county, Virginia, Kyle recovered judgment thereon, against the obligors for the amount thereof, interest and costs. Upon a transcript of the record of this recovery, Kyle sued Estes in the circuit court of Haywood, on the 24th of November, 1836, and declared in debt in the usual form. Estes pleaded *nul tiel record*, and the following special plea, namely—"That no execution had issued on the judgment mentioned in the declaration, within ten years next after the date of said judgment, nor were the said plaintiffs, or either of them under the age of twenty-one years, *femes covert*, *non compos mentis*, imprisoned, or without the commonwealth of Virginia, at the time the aforesaid judgment was awarded; and that the said judgment has never been revived by *scire facias*, or action of debt, and this, &c.; and in support of the above plea, relies on the statute of limitations of the state of Virginia, of ten years in such case made and provided, which statute was passed in the year 1819, c. 128, § 5 and 6: wherefore the said defendant prays judgment

if the said plaintiffs ought to have and maintain their aforesaid action against him." To this special plea Kyle demurred, and there was joinder in demurrer.

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At June term, 1837, of the circuit court of Haywood, judge READ sustained the demurrer, over-ruled the plea of *nul tiel record*, and rendered judgment for \$3,172 54 cents, besides costs, from which judgment the plaintiff in error prosecuted an appeal in nature of a writ of error.

By the Virginia act of 1792, c 76, § 5, revised in 1819, upon which the above plea was founded, it is enacted that—"judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of said judgment, and not after; or where execution hath issued and no return is made thereof, the party in whose favor the same was issued, shall and may obtain other executions, or move against any sheriff or other officer, or his or their security or securities, for not returning the same for the term of ten years from the date of such judgment, and not after."

J. M. STROTHER for plaintiff in error argued, that as by the words of the act of Congress of 1790, c 11, such faith and credit are to be given to the records and judicial proceedings of the states, when duly authenticated, in every court within the United States, as they have by law or usage in the courts of the state from whence they are or shall be taken;—and as in the state of Virginia, had the plaintiff in error been sued on this record, he might have pleaded the statute of limitations of ten years, it followed that he might plead the same plea here. Otherwise the same effect would not be given to the judgment in Tennessee, as it would have had in the state from which it has been taken. That the purpose of the act of Congress, in prescribing the effect of the judicial proceedings of the several states in all the rest, was to place them upon an equality, in all respects, with domestic judgments; to make them conclusive in the other states, or open them to enquiry and examination there, in the same way as they would be in the state where rendered. And he insisted that such was the view taken of the subject in *Hampton vs. Mc*

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Connell, 3 Wheaton, 234,—in *Mills vs. Duryee*, 7 Cranch, 481,—in *Moren vs. Killibrew*, 2 Yerger, 376, and in 2 Leigh, 175,—*Oliver's Precedents*, 447. That in over-ruling the plea of the statute, the court in effect, decided that the judgment should have greater effect here than in Virginia, where, beyond question, the plea would have been a bar to the plaintiff's action. That the plea does not assume to question the consideration of the judgment, but simply to insist that the defendants in error are precluded, by their laches from again disturbing the repose of those who have been allowed to remain in quiet more than ten years. That the defendants in error have to rely exclusively upon the act of 1790 to sustain their action, which act, by fixing upon the judgment, throughout the United States, the same efficacy as is allowed it by the laws of Virginia, gives to those laws, *quoad hoc*, an extra-territorial operation, and abolishes the principle of international law, that the *lex fori* must govern as to the application of remedies, 2 Leigh, 176. That as the judgment was barred in Virginia, it is likewise barred in Tennessee, 8 Peters, 528; and that statutes of limitations being intended to put an end to litigation and secure the peace and repose of society, ought to be favorably construed, Cooke 330, 7 Yerger, 405.

G. D. SEARCY for the defendants in error said—it is contended that this plea is a good bar to the action, by virtue of the constitution of the United States and the act of Congress of 26th May, 1790.

The constitution declares that "full faith and credit shall be given in each state to the records and judicial proceedings of every other state: and Congress may, by general laws, prescribe the manner in which such records and judicial proceedings shall be proven, and the effect thereof. The act of Congress of 26th May, 1790, after prescribing the manner of authentication declares—"the said records and judicial proceedings shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the states from which said records and judicial proceedings are or shall be taken."

Faith and credit, the terms used in the constitution, are terms peculiarly applicable to evidence. The act of Con-

gress adopted the terms used in the Constitution—"shall have such faith and credit given them."

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The effect then which records are to have, is their effect as evidence only. If they had in the courts of the state where rendered, the dignity of record evidence, they have the same dignity in every other court in the United States.

To make this plea good under the constitution and act of Congress, such construction must be put upon them as will give the judgment in the state where it is attempted to be enforced, the same force and effect as it has in the state where obtained. In other words, the manner in which, and the time when it is to be enforced, are to be governed by the laws of the state where the judgment is originally obtained. Such a construction would work great injury and injustice. It would, in effect, authorize the ministerial officers of the law in the state where it is attempted to enforce such judgment, to issue an execution thereupon without notifying the party of the fact, and indeed, without permitting him to controvert the existence of the judgment. He might be imprisoned contrary to the laws of his own state, and could not be delivered from such imprisonment but by pursuing the forms prescribed by the laws of the state where such judgment was recovered. It would make the judgment, whether obtained by attachment or otherwise, conclusive upon him, and deprive him of the right of showing a want of jurisdiction in the court rendering the same. It would be giving to the legislation of the state in which such judgment might be obtained, as to the manner and time of enforcing its judgment in other states, a binding influence beyond its territorial jurisdiction, and stretching the principles of international comity to such an extent as entirely to change the law of the forum. In the case of *Mills vs. Duryee*, 7 Cranch, 481, the court did not go to this extent. Upon a careful examination of that case, it will be found that the court in declaring the effect of the records, declare its effect as evidence only—"that if it had in the court where obtained, the faith and credit of record evidence, it should have the same faith and credit in every other court." I am fully sustained in this construction of the case of *Mills vs. Duryee*,—by numerous subsequent decisions upon this

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subject, where parties have been permitted to show that the court rendering the judgment, had no jurisdiction, 2 Dallas, 302; 6 Wheaton, 129; 1 Dallas, 129; 2 Yerger, 484 and 380; 3 Yerger, 395.

The doctrine laid down by Chancellor Kent, 1 Comm. 26, as declared in 4 Cowen, 292, "that any plea may be pleaded, which would be good to avoid the judgment where pronounced," refers only to such pleas as show the judgment to be void—as a want of jurisdiction in the court rendering the same, either as to the person of the defendant, or as to the subject matter, and not to such pleas as show the judgment to be voidable only. See note, 1 Kent, 261; 1 Halls N. Y. Rep. 155; *Starbuck vs. Murry*, 5 Wendle, 148; *Shumway vs. Stillman*, 6 Wend. 447; *Wilson vs. Chiles*, 2 Hall's N. Y. Rep. 358; Story's Confl. § 609.

It is contended by the counsel for the defendant in error, that the question here is to be determined alone by the principles of international law, and therefore the plea cannot be admitted, as it is a well settled principle, that the statute of limitations is the law of the forum, and operates on all who submit to its jurisdiction, 3 Peters, 277. Chancellor Kent lays down the doctrine, that remedies upon contracts are regulated by the laws of the place where the action is brought, and the comity of nations is satisfied with allowing to foreigners, the use of the same remedies, to the same extent that are afforded to the citizens of the state, 2 Kent, 462—3. It is upon this principle, that the statute of limitations of the state where the contract is made, is no bar to a suit brought in a foreign court, 8 Peters, 372; 1 Caine's Rep. 402; Story's Confl. § 576; 3 Johnson, 263.

In the case of *Jones vs. Hooks*, 2 Randolph, 303, in an action of debt founded upon a record of a judgment obtained in North Carolina, brought in Virginia, it was held that the statute of limitations of North Carolina is no bar, but that of Virginia, if applicable, governed the remedy.

Geo. S. YERGER on the same side said—It is clear from all the authorities, that if this suit had been brought on a contract, note, bond, &c. executed in the state of Virginia, the statute of limitations of that state could not be pleaded in bar

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in the courts of Tennessee, even if the plaintiff and defendant had been citizens of the former state and the period of limitation had elapsed during their residence as citizens.

So far as relates to the validity, interpretation and obligatory force of the contract, the laws of Virginia would govern; but as to the remedy, it is to be pursued according to the law of the state where the contract is attempted to be enforced.

So in general, any plea which operates a discharge of the contract, or affects its obligatory effect, and which would be available in the country where the contract was made, would be available every where. But pleas which only affect the remedy, as the plea of the statute of limitations, have always been held to be no answer to the suit in a foreign tribunal. The authorities on this point are numerous; a few of the principle ones are here cited—Story's Conf. 482: 2 Mason's Rep. 157: 4 Cowen's Rep. 528: *Lincoln vs. Battelle*, 6 Wend. 475: 9 Yerger 63: 3 Conn. Rep. 472: 1 Caine's Rep. 402: 3 Johnson, 263.

Even when a suit is instituted in the country where the contract is made, and the statute of limitations is pleaded, and a verdict and judgment rendered upon it for the defendant, it is unavailable when sued upon in a foreign state. The verdict and judgment does not extinguish the contract. It is *res judicata* only upon a plea which, in the courts of that state, merely destroys the remedy, leaving the contract in full force, 8 Peters' Rep. 370.

2. Does it make any difference that this action is founded on a judgment rendered in Virginia?

The construction of the act of 1790, c 11, has been settled in the case of *Mills vs. Duryee*, 7 Cranch's Rep. and *Hampton vs. McConnell*, 3 Wheaton, which decide the judgment to be conclusive evidence, and to have the same effect and validity as in the state where rendered.

So far then as relates to the judgment and its effect, it is as conclusive evidence of the debt, as in the courts of Virginia. But the statute of Virginia, providing that no action of debt or *scire facias*, should lie, &c. is no part of the judgment, has nothing to do with its effect, as evidence. The judgment has the same conclusive effect in Virginia, as evidence,

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after the expiration of ten years as before—for upon the plea of *nul tiel record*, it would be as conclusive after as before the act. The act of Virginia recognizes this, but it says—“notwithstanding its force and effect, as evidence, if you do not proceed upon it within a given period of time, your remedy or proceeding to enforce it shall be barred.”* This law evidently cannot operate “*extra territorium*” It does not extinguish or vacate the judgment, but merely provides the time within which an action of debt or *scire facias* shall be brought. The latter mode of proceeding cannot take place in any other state, or in any other court of Virginia except where the judgment was rendered. The action of debt also, in some states, for instance in Louisiana, would not be brought, and this strange anomaly might be presented, that if this statute is connected with the judgment, it might be pleaded in bar in Tennessee, where the action of debt on a judgment is known, and could not be pleaded in Louisiana, where that kind of action is not known.

The statute of Virginia evidently has relation only to the forms and modes of proceeding in the courts of Virginia, and has nothing to do with the validity and effect of the judgment. And there can be no legal distinction between the effect of a statute of limitation as to a judgment, or any other contract. Because a judgment has the same faith and credit, force and validity in other states, as in the state in which it was rendered; it does not follow that the same remedies are to be pursued in enforcing it—if so, an execution could issue to any state in the Union upon a judgment obtained in another, which is an absurdity that never can be contended for. In one state a judgment is a lien upon land—in another it is not. In one state lands cannot be sold under a judgment—in another it can. Can it be pretended that because lands can be sold in Tennessee under a judgment, it therefore follows, when it is attempted to be enforced in a state where they are not subject to a judgment, (as in Rhode Island,) that land in the latter state can be sold—and yet such is the necessary result of the doctrine contended for on the other side. To my mind it is clear, there is no—

*The execution of a judgment only forms a part of the remedy to enforce it.
10 Wheaton, 1.

thing in the construction in the act of Congress, that has the least influence upon the question. It is simply an attempt to enforce the act of limitations of another state, which upon settled principles of international law cannot be done.

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REESE J. delivered the opinion of the court.

An action of debt upon the record of a judgment obtained April 11. in Virginia, was brought by the defendants in error against the plaintiff. The latter, among other things, pleaded a statute of Virginia, which limits the right to bring an action of debt or *scire facias* upon a judgment to the term of ten years after its registration. To this plea a demurrer was filed, which the circuit court sustained; and whether the circuit court in that respect erred, is the question before us.

The counsel for the plea admits, that in general, in cases of contract, defences, arising from matters *ex post facto*, are governed by the law of the forum. And with regard to statutes of limitation especially, there can be no doubt, and it has not been here controverted, but that they are strictly questions affecting the remedy, and not questions upon the merits. And in such cases, it is said by an eminent jurist, to have become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law, otherwise the suit will be barred. Story's Conflict of Laws, § 577.

But, it is insisted that this suit having been founded upon a judgment rendered in one of the states of this Union, is subject under the constitution and laws of the United States, to the same defences, arising upon matters *ex post facto*, and affecting the remedy merely to which it would have been subject, if brought in the state where the judgment was rendered. The first section of the fourth article of our federal constitution provides, that "full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the effect thereof;" and accordingly, Congress prescribed the manner of

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proof, and provided that records and judicial proceedings shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from which the said records are or shall be taken." And here, at once it may be asked, if when, in a suit brought upon this Virginia judgment, we give conclusive effect to the record by again rendering judgment thereon, it can be pretended that we have withheld faith or credit from a record or judicial proceeding of that state, because we refuse to apply an *ex post facto* defence, affecting not the validity or conclusiveness of the judgment, but the remedy merely, but which would have been enforced if the suit had been brought in Virginia? The very statement shows, that here is no defect in faith and credit, or conclusiveness of effect, as to the record from Virginia; but the real complaint would be, that our own *lex fori*, as to the remedy should not cease to operate in favor of the local remedy of Virginia. If this could be done, it would follow, as a consequence, that the local remedy prescribed by the Virginia statute, would in that state cease to operate, whenever a suit might be brought there upon a judgment recover in any other state,—a consequence without and beyond the scope of the words or intention of the constitution and act of Congress,—a consequence injuriously affecting the power of the states, each for itself, to impose statutes on all for repose, and founded upon a policy alike salutary and enlightened.

But it is said, that in the case of *Hampton vs. McConnell*, 3 Wheaton, 234, and the case of *Miles vs. Duryee*, 7 Cranch, 481, the Supreme Court of the United States determined, that whatever pleas would be good to a suit brought upon a judgment in the state where it was originally rendered, and none others can be pleaded in any other court of the United States. But a reference to those cases will prove that this general language relates to pleas, affecting the validity and conclusive effect of a judgment, *qua* judgment. But in the cases themselves, or in the words of the court, there was nothing relative to the question of an *ex post facto* defence or plea affecting the remedy only, the judgment itself being taken as valid and conclusive.

Upon the whole we think the Judgment of the circuit court is correct, and must be affirmed.

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NOTE. Res judicata. A fact which has been directly tried and decided by a competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. This rule applies not only to verdicts and judgments at common law, but to the sentences of admiralty and ecclesiastical courts, to decrees in chancery,—and in short, to the judgments of all courts which have proper cognizance of the subject matter, so far as they profess to decide the particular matter in dispute. *Hopkins vs. Lee*, 5 Cond. R. 23. Story's Conf. c. 15.

RIGGS AND PRICHARD vs. PARKER's lessee.

GRANT. *Public survey omitted or effaced, private survey or remarking lawful, and estops.* If granted land, not originally marked by the surveyor, or whose marks have become obliterated or obscure, be afterward marked or remarked by the owner of the whole or part, in good faith, and in reasonable conformity with the calls of the patent, such private marking or remarking operates as an estoppel on the owner, the state, and subsequent grantees; precluding the owner from claiming land not included by the newly marked or remarked lines, and the state from claiming that which is included thereby.

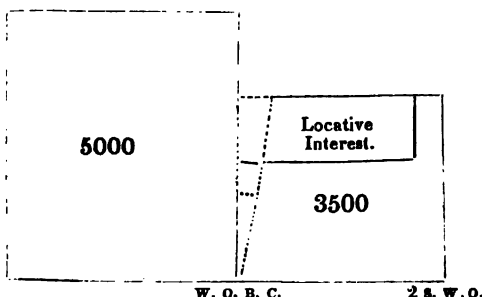
SAME. What marking or remarking is *bona fide*, and in reasonable conformity with the calls of the patent, is a question of fact, depending on the circumstances of each case.

North Carolina granted to Edward Sharp 5000 acres of land, the south east corner of which was a white oak, birch, and crab-apple. There was also granted, by patent 63, to Anthony Sharp, 3500 acres, the beginning corner of which was the same trees, and which called for running thence east 180 chains, to two swamp white oaks, thence north 194½ chains to a stake, thence west 180 chains to a stake, thence south to the beginning. The distance between the corner designated by the white oak, birch, and crab-apple trees, and that marked upon the two swamp white oaks, instead of being 180 chains, equal to 720 poles, was 830 poles. On the 13th of August, 1799, A. Sharp conveyed to James Robertson, who had located both tracts, one third being the locative interest of the 3500 acres, and in the deed described it as beginning on the north-west corner of the tract, a stake, and running south, &c. But as no line of the 3500

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acres had been marked in the original survey, except the first, and that was 110 poles longer than the distance assigned to it in the patent, it followed, that the place of the stake, called for in the deed to Robertson, as the north-west corner, if sought for by traversing the courses and distances called for in the patent, would be 110 poles east of the eastern boundary of the 5000 acre tract. And then there would lie between the two tracts a triangular parcel of land, as represented in the annexed diagram, not included by either patent. But if the north-west corner of the 3500 acres were sought for, by reversing the courses and distances from the white oak, birch and crab-apple, then the place of the stake would be in the eastern boundary of the 5000 acres, and there would be no vacant land between the patents.

Adopting the latter mode of seeking for the north-west corner of the 3500 acres, those in whom Robertson's interest had become vested by mesne conveyances, and from whom the plaintiffs in error claimed, had in 1830, caused that interest to be surveyed by one Mitchell, who marked a poplar and white oak, in the eastern boundary of the 5000 acre tract, as the place of the stake called for as the north-west corner of the 3500 acres. On the other hand, the lessor of the plaintiff, assuming the former as the lawful and proper method of surveying the 3500 acres, entered and procured a grant from Tennessee of a portion of the triangular parcel, represented by the dotted lines in the diagram, and thereupon sued the plaintiffs in error, namely, Riggs as tenant and Prichard as landlord in ejectment, in Dyer circuit court, on the 7th of March, 1835.



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On the trial at June term, 1837, before his Honor Judge HARRIS, and a jury of Dyer, Riggs and Prichard admitted that they were in possession of the premises at the commencement of the suit, but defended themselves by setting up an outstanding title, to establish which they relied upon the documentary and parol evidence recited in the opinion of the court. His Honor charged the jury as is also therein stated, and the result was a verdict of guilty; and a new trial being refused, this appeal in error was prosecuted.

FITZGERALD and SAMPSON, for the plaintiffs in error, insisted, that it was the duty of the officer who made the original survey, to lay down the land in an oblong or square, by running the lines to the cardinal points, act of 1777, c. 1, § 10; that it would be presumed he had done his duty, *McNairy vs. Hightower*, 2 Tenn. R. 302; that to survey the land, however, as was contended for, by the defendant in error, would not be in conformity with the requirements of the law upon the subject, as it would not be in an oblong or square, its lines would not run to the cardinal points; that it was apparent that the surveyor and the enterer both intended to make the eastern line of Edward Sharp's 5000 acres, the western boundary of the 3500 acres; that they had not done this was the effect of mere accident; that this showed that the remarking, whether in accordance with the law or otherwise was at least done in good faith, and certainly without any knowledge, on the part of those who did it, that they were including land not within the original limits of the grant, or which ought not to be within it according to the intent of the first appropriators; that the mere fact that the resurvey does include more land than the grant would include, if surveyed according to the calls for course and distance, would not, without *mala fides*, vitiate the remarking, *Johnson vs. Buffington*, 2 Washington, 116; *Taylor and Quarles vs. Brown*, 5 Cranch, 234; 1 Yerger, 488, opinion of Judge Whyte; that remarking being founded upon necessity, it was a favorite policy, both with the courts and the legislature, to sanction what parties, acting under such necessity, reasonably and fairly did, as might be seen from the acts of 1806, c 1, § 21; 1819, c 1, § 7, and *Williams vs. Buchanan*, 2

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Ten. R. 282, opinion of Judge Whyte, and the whole tenor of judicial decisions upon the subject, from 1813 to 1833, when the case of *Singleton vs. Whitesides*, 5 Yer. 18, was decided; that in the case of *Davis vs. Smith and Taply*, 1 Yer. 496, the resurvey was made by Searcy and Nechard, owners of part of the grant, who assumed only to mark what they themselves claimed, and between that case and the present it would be difficult to perceive a difference in principle; that the doctrine was now well established and generally understood, and that to unsettle it, as must be done to sustain the claim of the defendant in error, would be productive of much confusion, uncertainty and positive injury throughout the state.

A. W. O. TOTTEN, for the defendant in error, said that the principal question was, what is the true method of surveying the land granted to Anthony Sharp? As to which he insisted, that when a party had made his location, it became the duty of the state to survey and grant the land; that the survey is the evidence of the land designed to be granted, *Phillips' lessee vs. Robertson*, 2 Ten. R. 399; that the grant is conclusive evidence, against which no averment is allowed, that the survey had been made, *Garner vs. Norris' lessee*, 1 Yer. 65, Co. Lit, 260; and this, though there be a non-conformity between the grant and survey as to the boundaries of the land, *Person vs. Roundtree*, 1 Haywood, 378, note; that marked lines and natural boundaries, in making surveys, control the calls for courses and distances, *Blount's lessee vs. Madlin*, 2 Ten. Rep. 199; 1 Haywood, 237, 258; *Sims' lessee vs. Baker*, Cooke, 146, *Id.* 460; *Holland and Bridges vs. Overton's lessee*, 4 Yer. 482; that when there are no monuments of boundary the surveyor is to be governed by the courses and distances, see authorities cited and *Beuty's case*, 1 Haywood, 377; *Houston's Lessee vs. Pillow*, 1 Yer. 468; *Bradford vs. Hill*, 1 Haywood, 22; and *McNairy vs. Hightower*, 2 Tenn. R. 302; between which last case and this there is an exact similarity, since it decides that where but one line of a survey in the form of a parallelogram is marked, and two corners made, but the line is considerably too long, the second and third lines must be run the courses

and distances called for in the grant, and the fourth line made to close, disregarding courses and distances; that the authority of this case had never been questioned, 1 Yer. 488 and 493; that the defendant in error had assumed this to be the proper mode of surveying Anthony Sharp's grant, and in so surveying it there was no conflict between it and his claim, and consequently that there was no outstanding title to the land in controversy.

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2. As to the remarking he contended, that there was no such resurvey in this case, as the party could avail himself of, because it did not include the entire grant, and in fact was not intended to do more than simply to ascertain the locative interest, without attempting to identify and fix the boundaries of the grant; that as the doctrine of remarking is placed on the ground of estoppel, *Houston's lessee vs. Pillow*, 1 Yer. 481, a resurvey cannot be made by a third person so as to bind the grantee, and if the grantee is not bound neither is the state or subsequent grantees; that this resurvey, moreover, was not in conformity with the calls of the grant; that *Williams' heirs vs. Buchanan*, 2 Ten. Rep. 279; *Garner and Dickson vs. Norris' lessee*, 1 Yer. 67; and *Houston's lessee vs. Pillow*, 1 Yer. 481; the leading cases upon the doctrine, showed that remarking is not allowed when the original marks are in existence and known at the time, the party not being permitted to change the boundaries of his land made before the grant issued; but that, in this case, the survey of the locative interest had been made in total disregard of the corner designated by the two swamp white oaks, about the position of which there was no doubt, and in such manner that the eastern boundary of the grant, if completed by extending the eastern boundary of the locative interest to the southern boundary of the tract, would run many poles west of the swamp white oaks, and therefore to sustain this remarking, would be, in effect, to disregard the only well known and unquestioned monuments of the original survey, and that those who surveyed the locative interest had wilfully disregarded those notorious objects so as to include land which, it must have been obvious then, as well as now, would not be included by surveying the land according to the calls

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of the patent, and consequently the survey was a deliberate fraud upon the state, and therefore void, *Houston's lessee vs. Pillow*, 1 Yer.

GREEN, J. delivered the opinion of the court.

April 12.

Parker, the lessor of the plaintiff below, claims title to the land in controversy, under a grant to himself for two hundred acres, dated April 2, 1835.

The defendants claim to hold under a grant to Anthony Sharp, for 3500 acres, dated 10th day of July, 1783. The question is, whether the grant to Sharp covers the land in dispute? It calls to begin on Smith's line, and run with it and Martin Armstrong's line, east 180 chains, to two swamp white oaks; thence north $194\frac{1}{2}$ chains, to a stake; thence west 180 chains, to a stake; and thence south to the beginning. The proof shows that the beginning corner of this tract was well marked, and that the line east was marked to the south east corner, which was also marked. The other three lines of the grant were not originally run and marked. The distance from the beginning to the south-east corner is 830 poles, 110 poles longer than the grant calls for. If Sharp's grant be surveyed by running the first line to the swamp white oaks, the south-east corner as marked, thence north $194\frac{1}{2}$ chains, and thence west 180 chains, the distance called for, and thence to the beginning, the land in controversy will not be included. But if the third line be run the length of the first, and thence south to the beginning, the grant to Sharp will include the land in dispute. On the 13th of August, 1799, Sharp conveyed one third of his tract to James Robertson, to begin on the north west corner of his tract, a stake, and to run south $259\frac{1}{2}$ poles to a stake; thence east 720 poles, to a stake; thence north $259\frac{1}{2}$ poles to a stake, and west 720 poles, to the beginning. Robertson had conveyed the same land to Frederick Ward, on the 4th of February, 1799, who conveyed to Thomas McCrory, on the 13th of March, 1801. William L. Mitchell, a witness, proved that some time before 1830, he was employed by the McCrory's, sons of T. McCrory, who claimed to be the owners of the locative interest in Sharp's grant, to lay off and survey the same. That

he went to the beginning corner of said grant, the white-oak, birch, and crab-apple trees, then he went north with Edward Sharp's line to a poplar and white oak, which he marked, then he run east, to a white oak and elm, 792½ poles, then south and west from said white oak and elm. Witness marked so as to lay off the said locative interest of said McCrory, being one third of the grant, 1166½ acres. The lines run had never been marked, and he first marked them as the lines of the locative interest; that he did not survey the whole grant, nor mark other lines than those bounding the locative interest. Martin, another witness, stated that he had run the lines marked by Mitchell for the boundaries of the locative interest; that they were generally known, and that McCrory and those claiming under him had been in possession of the said locative interest, as marked, fourteen or fifteen years. The lines of Sharp's grant, as marked by Mitchell, included the land in controversy.

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The court charged the jury, that if the lines of Sharp's grant were not originally run and marked, but had been surveyed since the issuance of the grant, such resurvey to be valid, must be in reasonable conformity to the calls of the grant. That the proper mode of surveying the grant would be, to run the first line east to the swamp white oaks; and as there were no lines or corners marked from thence, it should be run north, the distance called for, and thence west 180 chains, the distance called for, and thence, a diagonal line, to the beginning; and that, unless such resurvey were so made, it was void and binding on no one. A verdict and judgment were rendered for the lessor of the plaintiff, from which this appeal is prosecuted.

We think the court erred in the charge to the jury. Although the court indicates correctly the method in which the grant should have been surveyed, yet to say, that unless it were so made, it would be void and binding in no one, prostrates entirely the doctrine of remarking. That doctrine is based upon the principle, that if the remarking be done, in good faith and in reasonable conformity to the calls of the grant, it operates as an estoppel upon all parties; and fixes the lines as marked, though it afterwards may appear that the

GRAHAM vs. McCAMPBELL.

VENDOR AND PURCHASER. *Property charged with price.* Unpaid purchase money secured by a mortgage of the property sold, or simply by a reservation of the title in the seller, draws after it, when assigned, the security provided for its payment.

SAME. *Assignee.* Hence, in sales of land, when the vendor gives his bond for title, and the purchaser his note for the money, an assignee of one of the notes may, without more, subject the estate to the payment; as he may, also, in the case of a mortgage.

SAME. *Assignment does not carry vendor's lien.* But if the title pass out of the vendor by conveyance, his equitable lien does not pass to an assignee of the purchase money. Acc. *Gunn vs. Chester*, 5 Yerger, 205.

CASE OVER-RULED. *Clairborne vs. Crockett*, 3 Yerger, 27, so far as it conflicts with these propositions, is over-ruled.

John McIver sold to James McCampbell, on the 14th of August, 1826, four hundred and sixty-four acres of land, and to secure the purchase money, McCampbell executed his three several bills single, each for \$773 33 1-3 cents, payable on the 7th of September, in the years 1827, 1828, and 1829. And a title bond was executed to McCampbell by McIver, conditioned that, if after payment of the bills, he, his heirs, &c. should make McCampbell, his heirs, &c. a deed in fee simple with general warranty, then the obligation of the bond to be void, &c. In the spring of 1827, McCampbell took possession of the land, and continued to hold and enjoy it as purchaser.

McIver in his life had assigned the first of these bills single to Jesse Blackfan, who assigned it to McDonald and Ridgely, who recovered judgment against McCampbell in Roane county circuit court, on the 30th of January, 1830, for \$887 88 cts. The second was assigned by McIver to Charles I. Love, and by him to Isaac H. Lanier, who, at the same session of Roane circuit court, recovered judgment thereon against McCampbell for \$837 75 cents. The third remained in McIver's hands at his death. All of them being unpaid, and executions having been issued upon the judgments, and returned, *nulla bona*, and McCampbell having no property out of which the money could be made; Graham, as administrator of McIver, together with his heirs at law, and the assignees of the bills, joined in a bill in the chancery court at Paris, stating the above facts, and praying for an account of the principal

and interest due for the purchase money; that the contract might be specifically executed, or that the land might be sold to pay the purchase money. Graham
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McC Campbell's answer admitted the above facts, but insisted that the assignees of the securities given for the purchase money were not entitled to the relief prayed for in the bill. A replication was filed, and the cause was heard upon the bill, answer, replication and exhibits, by Chancellor BROWN, on the 20th of September, 1837, who dismissed the bill as to the assignees; and as to the security which had not been assigned by the intestate in his life-time, ordered an account, and that the land should be sold to satisfy it. The complainants appealed in error.

GEO. S. YERGER for the complainants said—The contract is entire in this case, and the vendor cannot have a specific performance for a part, his only remedy is to have the contract executed entirely, and in such case, if the notes are assigned, the assignees must be either complainants or defendants.

The lien for the purchase money attaches as a trust, whether the land be actually conveyed or only contracted to be, 2 Story's Eq. § 1218: and it may be enforced in favor of third persons claiming under the vendor, or rather they will be subrogated to his rights, 2 Story's Equity, 1227; *Selby vs. Selby*, 4 Russell, 336; *Eskridge vs. McClure*, 2 Yerger, 84: that if a creditor would be substituted when the vendor's personal estate is exhausted, and this by operation of law much more would an assignee of the identical debt: that the remedy in cases of specific performance is mutual, 2 Story's Eq. § 790: now if the heirs of McIver had sued for the land, and McC Campbell wanted a specific performance, he would have to pay all the money due, and make all the assignees parties: that a mere assignment of part of the consideration is not a rescission of the contract, or a bar to a specific performance: that the debt is the principle thing, and the assignment of the debt draws after it the property as incident thereto, 11 Johnson, 538, 2 Powell on Mortgages, 966, note 1; 2 Day's Rep. 374; *Duchess of Buccleugh vs. Hoare*, 4 Madd. 467; 3 Powell, 1028, note; *Martin vs. Mowlin*, 2 Burrow, 969; 3 Ves. & Beame, 49; 1 Johnson, 591; 2 Powell on

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McCampbell. Mortgages, 429, note T. *Claiborne vs. Crockett*, 3 Yerger, is a wholly distinct case from this; there Brooks, the party who sold, had the legal title,—he conveyed by direction of Hicks to Claiborne for a valuable consideration. Claiborne had no notice that any of the purchase money was due, and as against Claiborne the assignment of the note was an extinguishment of the lien: that *Gann vs. Chester & Blair*, 5 Yerger,—was a conveyance absolute. The notes were assigned, and the vendor mortgaged the property without notice to the mortgagee, who is to be regarded as a purchaser for a valuable consideration without notice.

X Where there is a bond, it is a trust coupled with a lien; when a conveyance it is simply a lien.

Cook, for the defendant, contended—that the lien was gone so soon as the notes were assigned, and to this point, that the case of *Claiborne vs. Crockett* is a direct authority, 3 Yerger, 27. That was the case of a sale by a bond for title, and is in every particular like the present case. The cause was not decided on the ground that Claiborne was a purchaser, but on the ground that the lien was lost by assignment to Crockett. *Gann vs. Chester* is also to the same effect, though the point is not directly decided, 5 Yerger, 205.

But it is said this is a case for specific performance; and therefore, the whole consideration must be paid.

This is begging the question. It is admitted that so far as McIver's representatives are concerned, that is as to the last note, it would have to be paid. But unless they were fixed as endorsers they have no interest in the other notes. They could not resist a specific performance by McCampbell by alledging that these notes are not paid. The answer to such a defence would be,—“you have no interest in that matter, you are not liable for the notes.” They now constitute a mere personal demand against McCampbell and have no connexion with the land.

But this is emphatically a bill to subject the land to the payment of the notes. We ask no relief but stand on our rights, legal and equitable.

TURLEY J. delivered the opinion of the court.

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The only question presented for consideration in this case, is whether the assignee of a note given in part of the consideration for the purchase of land, to secure the payment of which the vendor reserved the legal title in himself, giving to the vendee a bond to convey upon the payment of the purchase money, is by virtue of the assignment entitled to have his debt satisfied by a decree of a court of chancery out of the land, there having been no assignment of the security thus reserved by the vendor.

It is argued that he has not upon the authority of the case of *Claiborne vs. Crockett*, reported in 3 Yerger, page 27. It is true, that case does support the proposition contended for, the decision having been made upon a state of facts similar to those existing in the present case; but we are not satisfied with the reasoning of the court, and apprehend that the decision was made upon what we consider the erroneous supposition, that the vendor, when he reserved the title to secure the payment of the purchase money, had nothing but a mere lien upon the estate, as it is considered and treated throughout the opinion. The correctness of the opinion depends upon the truth of this proposition, for we concede, that if the vendor has a mere lien for the security of his debt, a transfer of the debt does not of itself transfer the lien. A lien, strictly speaking, is a charge upon property given by operation of law, without the agency of the person benefitted by it, in illustration of which may be mentioned, the lien which a vendor has upon the land conveyed, in the hands of the vendee or purchasers under him with notice, to receive the purchase money; the lien which a judgment creditor has upon the estate of his debtor, for a year after the rendition of his judgment; the lien which an inn-keeper has upon the horse of his guest to secure the payment of his bill, &c. In all these cases and others of a similar character, there is nothing but a mere lien, to secure the payment of a debt, which being created by operation of law, is confined to the person in whose favor it exists, and has no such connection with the debt, as to cause it to pass by an assignment thereof. That the court in the case of *Claiborne vs. Crockett*, considered the security to be of this

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character, is evidenced, not only by its being so called, but also by the fact, that the authorities cited in support of the decision are all, in reference to liens of this description.

X This makes it necessary for us to enquire whether the reservation of title, by a vendor, is a mere lien for the payment of the purchase money.

We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of the debt, and a legal title retained to secure the payment of a debt. In both cases courts of chancery consider the estate only as security for the payment of the debt, upon the discharge of which, the debtor is entitled to a conveyance in the one instance and a re-conveyance in the other. We therefore think, that so far as the question in controversy is involved, the same rules of construction apply equally to a mortgage and an estate the legal title to which is reserved by the vendor, to secure the payment of the purchase money. In the case of *Conrad vs. The Atlantic Insurance Company*, 1 Peter's Rep. 441, Judge Story, in delivering the opinion of the court, says—"it is true, that in the discussions of the courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect, equity follows the law; it does not consider the estate of the mortgage as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose sense that it is sometimes called a lien and then only by way of contrast to an estate absolute and indefeasible." These principles apply with equal force to the case of a sale of lands, when the title is reserved by the vendor, so soon as the purchase money is paid, there is a resulting trust for the vendee, which is always enforced by a court of chancery. In the case of a mortgage, the remedy is by bill to redeem, in the case of a sale without conveyance by bill for a specific performance of the contract; and as the land is considered only as security for the debt;

the parties have a natural right to ask the aid of the court of chancery to enforce the payment by a sale of the property. X Graham
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The land then being a security for the payment, it follows, as we think by necessary analogy, that a transfer of the debt is a transfer in equity of the security. It has never been doubted that it is so in the case of a mortgage. In the case of *Martin vs. Moulin*, 2 Burrow's Rep. 979, Lord Mansfield says—"a mortgage is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it, though the debt were forgiven by parol; for the right to the land would follow, notwithstanding the statute of frauds." In the case of *Auston vs. Burbank*, 2 Day, 474, it was held by the Supreme Court of Connecticut, that an assignment of the mortgage debt without a conveyance of the legal title would entitle the assignee to sustain a bill for foreclosure. In the case of *Green vs. Hart*, 1 Johnson, 80, it was held by the Court of Errors, that where a debt is secured by mortgage and transferred by the mortgagee, he becomes a trustee for the benefit of the person having an interest in the debt. In the case of *Runyan vs. Mersereau*, 11 Johnson, 534, the Supreme Court says, that the assignment of a mortgage debt draws the land after it as a consequence.

The debt in these cases is considered as the principal, and the land as an incident only; they prove beyond a doubt, that the assignee of a debt secured by a mortgage, is entitled to have it paid out of the mortgaged estate if need be, although he has had no assignment of the estate; they apply, as we think, with equal force to the case of an assignee of a debt secured by a reservation of the title by the vendor; and we hold that in each case, the assignee may file a bill to subject the estate to the payment of his debt, although there has been no assignment of the estate to him, and that the case of

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McCampbell. *Claiborne vs. Crockett*, so far as it conflicts with this view must be overruled.

The judgment of the Chancellor will be reversed and a decree given for the complainants in conformity with this opinion.

NOTE. In Kentucky it has been decided that the assignee of a bond for purchase money, upon the sale of land, has the same lien that the purchaser had—4 Littell, 289, *Kenny vs. Collins*; 5 Monroe, 287, *Eubanks vs. Poston*,—as also has the assignee of a judgment recovered upon such bond, 4 Littell, 317, *Johnson vs. Gwathmey*, Bibb C. J. dissenting; 5 Monroe, 312. In the case in 4 Littell, 317, the vendor had conveyed the land in fee, and the vendee having sold and conveyed, the lien was set up at the suit of an assignee of one of the bonds, against the second purchaser, who was held to have had implied notice of the lien, because the deed to the vendee, from whom he purchased, recited that the money was secured to be paid in several instalments, some of which were not due at the debate of this purchase. The distinction taken in this case, therefore, between the vendor's equitable lien and his security by mortgage or by reservation of the title, is not admitted in Kentucky. But there is certainly a marked difference between the cases. In the one, the legal title still remains in the vendor; in the other, he has not even an equitable estate in the land. It is a bare right which has no existence, until it is established by the decree of a court in the particular case, 1 Mason, 221. Nevertheless, a reason does not readily occur why this right might not as well pass by force of an assignment of a security for purchase money, as an incident to the money, as the legal title in the case where it is taken back by mortgage, or simply reserved to the vendor.

GRAVES vs. CARUTHERS.

CONTRACTS. *Obligation of contract.* The obligation of a contract for work and labor is neither annulled, because it is ascertained, before the work is begun, that it is unnecessary or useless, nor because the employer cannot determine how he will have it done.

SAME. *Same—assignor and assignee.* If one joint undertaker of work, assign to the other his interest in the job, the assignee risks the contingencies expressed in the contract, and is bound to pay the consideration promised the assignor, although the employer altogether fail.

SAME. *Same.* If canal commissioners employ several joint contractors to construct walls and wing dams, but not to begin till the result should be known of certain dredging and sluicing, upon which the location, form and dimensions of the walls and dams were to depend, the failure of the contractors for the dredging and sluicing, and consequent inability of the commissioners to prescribe the location, &c. of the walls and dams, does not discharge the obligation of the contract for the walls and dams on either side.

The engineers of the board of internal improvements of the United States, for the improvement of the Tennessee

river, from Florence to Waterloo, projected certain improvements, which were approved by the President, on the 8th April, 1831, consisting, 1. of excavations of the several channels, by dragging and blasting; and 2, of walls and wing-dams, designated in the engineer's survey, location and distribution of the work for contract, as sections 1, 2, 3, and 4, embracing respectively the following places: 1. Tuscum-bia shoals, 2. Big Buck shoals, 3. Colbert's shoals and Brush-river-island shoals, and 4. Bee-tree-island shoals.

Contracts were made by the board of Tennessee canal commissioners, on the 25th of September, 1830, for the excavations, with Drum, Elder & Co., and for the walls and wing-dams, with Graves, Caruthers & Co. In the latter contract was the following clause—"And whereas, it is the intention of the board of internal improvement of the United States, according to the projected plan above referred to, not to construct the dams or walls, herein specified, before the result of certain dragging and sluicing of the channel, as designated in the engineer's survey, location and distribution of the work for contract, shall be ascertained, it is expressly agreed and understood, between the parties hereto, that the said board of commissioners reserve to themselves the right and privilege of changing the location and form, and varying the estimated dimensions of the said walls or wing dams, as economy and public expediency may require; and further, that the commencement of the work by the parties of the first part, as hereinbefore required, shall be considered to consist in quarrying and hauling of rocks, of which they shall be at liberty to procure, under the direction of the engineer, at least 10,000 cubic yards."

On the 18th of March, 1831, Graves, by deed, assigned to Caruthers all his interest in this contract, being two thirds of it, for \$9000, of which \$5000 were to be paid down, and the remaining \$4000, in two yearly instalments, for which notes, with two good responsible sureties were to be given. The \$5000 were paid by Caruthers in a note for that amount, drawn by him and discounted at the branch of the Bank of the United States, at Nashville. For the \$4000, two promissory notes, bearing date with the assignment, were

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executed by John Caruthers, James Caruthers, and Armour and Lake, each for \$2000 dollars, payable to Graves, or order at the said branch bank at Nashville, in one and two years respectively. The first was paid. Upon the latter, Graves sued James Caruthers and Armour & Lake in the county court of Madison, on the 17th of December, 1833, in assumpsit, and on the 6th of May, 1834, had judgment for \$2132. The defendants obtained a fiat for a *certiorari* from his Honor Judge HASKELL, on the 18th of June, 1834, and the record of this recovery was certified into Madison circuit court, on the 21st of the month.

At April Term, 1837, it was tried before Judge READ, of the 10th circuit and a jury of Madison.

The defendants proved, in order to show a failure of the consideration of the note sued on, that the contract of Drum, Elder & Co. was impracticable, so far as it related to Colbert's shoals, as the bed of the river there is a solid rock for nearly half a mile in length; that though it was not impracticable to perform that contract, so far as it related to the other sections of the river therein mentioned, yet that it was impracticable for them to have done it, within the time specified, with their force and means; that they had not, in point of fact, completed any section of their work, and had finally abandoned it; that the contract of Graves, Caruthers & Co. was an excellent one, and might have been made profitable, if well managed; that the opinion became prevalent, that if the excavations to be done by Drum and Elder had been completed, the navigation of the river would not be at all improved, but rather prejudiced; that this opinion being also entertained by the commissioners, they resolved to abandon the project, believing they were authorised to do so, by the clause of the contract before recited; that though Graves and Caruthers, and particularly Graves, after the assignment of his interest to Caruthers, contended, that their contract with the board was absolute, and that the work, therein mentioned, could not, in any event, be lessened or diminished, yet the board resolved not to have the work done, and by authority of an act of the legislature of Alabama, paid Caruthers for his losses, &c., \$5500, exclusive of the amount

of estimated work previously done by Graves and Caruthers.

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His Honor in charging the jury explained the case at large, but summed it up as follows—that if they believed the contract of Graves, Caruthers & Co., for the walls and dams, was practicable, according to its terms, and in reference to the contract of Drum, Elder & Co., the plaintiff was entitled to recover; or, if they believed, that Caruthers derived any benefit, upon the compromise with the commissioners, over and above a reasonable compensation for his expenses and attention to business, the plaintiff would be entitled to recover, otherwise they would find for the defendants.

The jury found for the defendants. The plaintiff moved for a new trial, which was refused, and he prosecuted this appeal in nature of a writ of error.

W. STODDERT, for the defendants, argued that mistake and mutual error will be relieved against, and cited, 1 Com. Dig. 289, in note; 1 T. R. 285; 2 T. R. 645; Fonblq. 432: that upon the assignment of a covenant, an implied warranty will render the assignor liable, if the covenant be avoided, or rendered of no effect, from any defect attached to the original transaction, *Boyd vs. Anderson*, 1 Ten. R. 446: that the jury, by their verdict, found that the quarrying and hauling of the 10,000 cubic yards of stone was not a substantial part of the contract, nor the inducement to it, and the court, upon that point, charged the jury correctly, 2 Kent, 471, 475; substantial error destroys a contract, Pothier on Obligations, 5; 2 Kent, 468: that the court did not err in refusing to charge that the compromise estopped Caruthers from setting up failure of consideration: that the compromise did not hinder the execution of the work on the part of Drum, Elder & Co., it did no injury to Grave's rights, since if any thing were made by it, he, as partner, was entitled to a share of it, and a matter *ex post facto*, like this, could not determine the complexion of a transaction already past; and that if there was any error in the charge of the court, in relation to the effect of the contract of Drum, Elder & Co. in this contract, it was in favor of the plaintiff, as it is really questionable whether Graves and Caruthers did not assume the performance of the contract of Drum, Elder & Co., as a mat-

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ter certain, and if they did, their failure, without the fault of Caruthers, would of course, annul the contract between him and Graves.*

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TURLEY, J., delivered the opinion of the court. Hiram Graves, John Caruthers, and William Brown, entered into a contract on the 25th day of September, 1830, with the board of Tennessee canal commissioners, by which they bound themselves to procure the materials, prepare the foundation and construct the walls and wing dams designated for the improvement of the navigation of the Tennessee below Florence, for which services the commissioners were to pay the consideration agreed upon with the parties, which need not be here specified.—The board of commissioners reserved to themselves the right of reducing or increasing the cost of the work, subject to a reasonable and fair deduction from, or addition to, the prices agreed upon. The work to be finished within thirty months after the time the engineer should require the work to be begun. The board of commissioners also reserved to themselves the right and privilege of changing the location and form, and varying the estimated dimensions of said walls or wing dams, as convenience or public expedience might require, and assign as a reason for so doing, that it was the intention of the board of internal improvements for the United States, not to construct the dam or walls before the result of certain dragging and sluicing of the channel should be ascertained; and it was expressly agreed that as soon as the work for dragging and clearing out the channel, or any section of it should be completed, and the result ascertained, the engineer should immediately determine the form and location of the dam in said sections.

After this contract was made, and before any part of it was performed, Hiram Graves, for, and in consideration of the sum of \$9,000, assigned all his interest in it to his co-partner, John Caruthers. All of this sum has been paid; except the note for \$2000, which is the subject matter of contro-

* The late Reporter left no brief or memorandums of the counsel who argued for the plaintiff.

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versy in this suit. After the contract was assigned, the persons employed by the canal commissioners to drag and sluice the river, failed to comply with their contract, part of which it is proven it was impracticable to execute with their means in the time prescribed for its completion. The consequence was that the river was not dragged and cleared, as contemplated, and therefore the board of the Tennessee canal commissioners refused to permit the erection of the dams and wings contracted for by Graves, Caruthers & Co., by which Caruthers sustained losses, for which the commissioners paid him five thousand dollars. But this, it is alledged, did not more than pay him for his expenses; and that the whole affair has been a losing concern to him, because of his not having been permitted to erect the walls and dams, which were the profitable parts of the contract, and without which, he would not have purchased his co-partner's interest therein.

Upon this state of the case, it is contended that the contract of assignment between Hiram Graves and James Caruthers was void, because at the time it was made, the performance of the contract assigned, depended upon the contingency of dragging and sluicing the river, which was found to be impracticable; and that therefore, there was in fact, no contract to be assigned. To this objection, there are two answers, either of which, in our opinion, are good and sufficient, 1st. There is nothing in the case which shows that it was impracticable to drag and sluice the river. It is spoken of as a matter of great difficulty in part, and as impracticable to its full extent, in the time prescribed in the contract, with the persons who had engaged to do it, with the means by them employed, &c.

The contract made with Graves, Caruthers & Co., was not dependent upon the contract for dragging and sluicing the river; and it would have been no defence for the canal commissioners, if sued upon their contract, to have said that Drum, Elder & Co., failed to drag and sluice the river, and therefore, we refused to execute our contract with you. They had reserved to themselves no such right—their contract for building the walls and wing dams, was absolute, not dependent upon any condition; and if it had been found utterly

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impracticable to drag and sluice the river, and so made it useless to build the dams, they would have still been liable for a refusal on their part to permit it. It is true they reserved to themselves the right of changing the location and form, and varying the estimated dimension of said wall and wing dams, so commenced, as public expedience might require. But this is nothing like a reservation of the power to dispense with their erection altogether, and they agree that so soon as the work for dragging and clearing out the channel of the river or any section of it shall be completed, the engineer shall immediately determine the form and location of the dam in such section.

The provisions in the contract made it necessary to desist till some portion of the river was dragged and sluiced, before the erection of the dams was commenced; but no time being specified for this to be done, and it not being made to depend upon a contingency, the canal commissioners were bound to have it done in a reasonable time, and if they did not they were liable to an action by Graves, Caruthers & Co. It is not pretended that Graves practised any fraud upon Caruthers in his contract with him; he assigned him all his interest in a valid and subsisting contract, about which Caruthers knew as much as he, and because the canal commissioners have failed to execute their part of the contract, furnished no reason why Caruthers should be relieved from his. That the commissioners might do so, if they thought proper to disregard this contract and risk the consequences was evident, and affords us no more reason for rescinding Grave's contract with Caruthers, than would the refusal of a debtor to pay his note which had been assigned without recourse, vitiate the assignment and make the assignor responsible for the amount paid for it. And such a view seems to have been taken of the contract both by the canal commissioners and Caruthers, for they paid him five thousand dollars to cover his damages, sustained by reason of their non-performance of their part of the contract which they need not have done had they reserved the right so to do.

But we are furthermore of the opinion that if such reservation had been made in the contract, Caruthers, by the as-

signment took it subject thereto, and could not be heard to complain afterwards at its exercise. He got what he bought, there was no fraud practised on him, and though the contract was a loosing one, yet the law compels him to abide by it; so that whatsoever way we look at this contract, we are compelled to say that the court below erred in the administration of the law.

The judgment must therefore be reversed and the case remanded for a new trial.

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PRACTICE. Conduct of Trials. Rules as to the order and conduct of trials may be inflexibly adhered to or relaxed, according to the discretion of the presiding judge, and the circumstances of each case, so as thereby to attain, and not defeat the end of their adoption.

SAME. Evidence closed—fresh proof. The plaintiff's counsel having stated that his evidence was closed, and the defendant's, that none would be introduced on his side, it is not error to refuse the plaintiff leave to examine a witness summoned by, and attending on behalf of, the defendant, however material his testimony, *Wells vs. Atkinson*, 12 Eng. Com. Law, R. 125.

NEW TRIAL. Plaintiff's affidavit. It is not error to refuse a new trial upon the plaintiff's affidavit of the materiality of testimony known to him before the trial, or, if unknown to him, without the accompanying affidavit of the witness.

Cozart loaned to Lisle, to be used in a specified journey, without hire, a mare, which died immediately after being returned to him, of a sickness contracted in the journey. On the 9th of March, 1835, he sued Lisle in the circuit court of Carroll in trespass on the case, to recover the value of the mare. On the trial of the cause, before his honor Judge HARRIS of the 9th circuit, at November Term of the Carroll circuit court, 1837, the plaintiff's counsel, after examining several witnesses, stated that he had concluded his evidence; and thereupon the defendant's counsel stated that they had no proof to offer. And before any other, or further action in the cause, and before the commencement of the argument of counsel, the plaintiff asked leave of the court to introduce and examine another witness, stating as a reason therefor, that the witness had been summoned, but not examined, by the

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defendant; that the plaintiff expected the defendant to examine said witness, and to have the benefit of his testimony on cross examination; that the counsel of plaintiff did not know of the materiality of the witness' testimony, till after he had stated to the court, that he had closed his evidence. The defendant's counsel objected to the evidence. The plaintiff's counsel then offered to state in what the materiality of the witness' testimony consisted; which the court refused to hear, as also to permit the examination of the witness, declaring that the witness could not be heard, however material, and ordered that the counsel proceed with the argument. The jury having found a verdict for defendant, the plaintiff moved for a new trial, and supported his motion by his own affidavit, stating the facts above recited, and those he expected to prove by the witness. The motion was overruled; and to the whole matter, the plaintiff excepted, and prosecuted this appeal in error.

A. W. O. TOTTEN, for the plaintiff, to the point that it was an illegal exercise of the discretionary power of the court in the conduct of trials, to refuse to allow the witness to be examined, cited Story's Pleading, 72, (i); 7 Mass. Rep. 518, and 1 Burrow, 394. 2. That witnesses may be introduced before the commencement of the argument, but not afterwards, for the reason that it would be impolitic and dangerous to allow a party to supply defects in his cause after they have been pointed out, he cited Graham on New Trials, 258; 1 East, 614; 2 Johnson's cases, 318; 2 Tenn. R. 16. 3. That a new trial will be granted for an error in the exercise of the discretionary power of the court below, he cited *Mercer vs. Sayre*, 7 Johnson, 306; 7 Wend. 181; Graham on New Trials, 260, 262; 6 Wend. R. 242; 4 Term. R. 753, —and it was not, he said, a reasonable exercise of the discretion of the court, in this instance, since the cause had not assumed any new attitude. 4. To the point that the verdict was against law, he cited 2 Kent, 447; Jones on Bailments, 75, and Appendix, 12; case of *Coggs vs. Barnard*, to show that the defendant had not used the degree of care required by law in case of such a bailment; Peck's R. 365.

FITZGERALD, for the defendant, insisted that the verdict was in accordance with the testimony; and that the authorities justified the refusal of the court to grant a new trial, Eng. Com. Law K. 120; 14 *Id.* 391, 393; 2 Johnson's Digest, 142.

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REESE, J. delivered the opinion of the court.

The bill of exceptions in this case show, that when the plaintiff, on the trial of the case before the jury, had examined his last witness, his counsel stated that he was through with his testimony; that thereupon the defendant's counsel stated that no proof would be offered on that side; and that before any other or further action on the case, and before the commencement of the argument by counsel, the plaintiff asked leave of the court to introduce and examine another witness, stating as a reason therefor, that the witness had been summoned by the defendant, but not examined by him, and that plaintiff had expected that defendant would have called and examined the witness, so that he, on cross examination, could have had the benefit of his testimony. The counsel for plaintiff offered to state to the court the facts to be proved by the witness, so as to show their materiality, which the court refused to hear, and rejected the witness,—stating that the witness could not be heard however material, and ordered that the counsel should proceed with the argument. This it is said was error.

It is important to the regular and successful administration of the laws, that the circuit courts should adopt and enforce certain rules as to the order and conduct of trials before them. These rules, under the influence of a prudent and enlightened discretion, will sometimes be inflexibly adhered to, and sometimes a little relaxed, according to the peculiar circumstances of each case, so that they may attain, and not defeat, the ends for which they were adopted. It would be unwise and hazardous, on the part of this court, to attempt any rigid control over the circuit courts in the exercise of a discretion to enforce or relax their own rules of practice.

In this case, for instance, it might seem to us, that if we had been on the circuit court bench, we might have felt it to be our duty to have heard the witness; yet, from the point of

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view which we occupy, some circumstances which may escape our observation may have been obvious to the circuit court, and may have led to a different path as the line of duty. For any thing the bill of exception shows, many hours may have intervened between the time when the plaintiff announced that he had closed his proof, and the time of his moving the court to introduce the witness, in which interval, the defendant, by the retirement of his witnesses, might have been subjected to surprise. It would therefore be wrong in us, under the circumstances shown in the bill of exceptions, to lay down that the rule of practice should have been enforced or relaxed.

As to the application for a new trial, founded upon the affidavit of the plaintiff, we think the court acted correctly, in refusing to grant it—because, 1. the testimony was known to the plaintiff before the trial; and 2. the affidavit of the plaintiff should have been accompanied by that of the witness or its absence accounted for. Let the Judgment be affirmed.

NOTE. Starkie, Ev. 1 Vol. 161, 2d ed., says it has been held, that if a witness has once been called into the box and sworn, he may be cross examined by the opposite side, although he has not been examined in chief; and he cites for this, *Phillips vs. Eamer*, 1 Esp. C. 357, *R. vs. Brooks*, 2 Starkie's, C. 473. But this doctrine is denied by Gibson, C. J. in *Elkner vs. Buckley*, 16 Serg. and R. 77, where he says it was broached in Phillip's Law of Evidence, 211. See Roscoe's Criminal Evidence, 128 and note 2.

MARSH vs. BARR.

BILL OF EXCHANGE AND PROMISSORY NOTE. *Indorser—notice of protest.*

Though the holder of a negotiable security know the residence of the indorser, yet he may not know the post office nearest thereto; and in such case notice of protest directed to the post office, which, after diligent inquiry, is supposed to be nearest, will bind the indorser.

SAME. *What is diligent inquiry?* Inquiry made of such persons, where the security is made payable as may reasonably be supposed capable of giving the desired information, is diligent inquiry in legal contemplation.

CASES. *Davis vs. Williams*, Peck, 191; *Dunlap vs. Thompson*, 5 Yerger, 67; *Nichol and Hill vs. Bats*, 7 Yerger, 305, approved.

This was an action by the indorsee against the indorser of a negotiable bill single, which had been executed by one

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Harper for goods purchased of John Williams, the beneficiary in the suit, and indorsed by Marsh, the payee, as accommodation indorser for Harper. The debate was as to the sufficiency of the notice of the protest for non-payment, to which point, the record, among others not necessary to the question, presented the following facts.

That the bill was duly presented for payment by a notary, who, not himself knowing the residence of Marsh, or to what post office he ought to address him a notice, made diligent inquiry, and among those inquired of for the residence of Marsh, were the cashier of the bank in Nashville, where the bill was payable, the postmaster at Nashville, and John Williams, a party to the paper, and the result of the inquiry was the conviction of his mind that Jackson, Tennessee, was the proper and correct address of Marsh; and he did accordingly, on the evening of the 25th or morning of the 26th of May, 1833, the day of or after the maturity of the bill, and before the closing of the mail of the day, make out and put in the post office at Nashville, a notice of protest, addressed to Marsh at Jackson, to whom the post master at that place had, between the years 1825 and 1833, delivered letters, which had been directed to him there, and where he had occasionally called for letters.

To rebut this evidence, the defendant proved that in the fall of 1832, John Williams had been at the store of Harper, the maker of the bill, within two hundred yards of Marsh's house, and on inquiry for Marsh, had been shown his house, and so knew the place of his residence; that there was then, and had been, a considerable time, a post office, kept within two hundred yards, and in sight, of Marsh's house, called Clover-creek post office, at which Marsh received and mailed all his letters; that this post office had been established in 1827, about a mile and a quarter from Marsh's; and had been removed to Clover creek, and that Marsh had resided there since 1825 or 1826.

The suit was tried in Madison circuit court, at August term, 1837, before Judge BARNY of the 11th, sitting instead of READ, Judge of the 10th circuit, and his Honor charged the jury,—That if the indorser's place of residence was known

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to the holder of the bill, or to his agent the notary public, and the nearest post office to that residence was also known to either of them, the notice must be sent to such post office; that if either the indorser's residence or the post office nearest thereto, was unknown to either of them, they were bound to make diligent inquiry therefor; that inquiry to be diligent, in legal contemplation, must be made of such persons at the place where the bill or note is payable, as may reasonably be supposed capable of giving the required information; that when this is done, the law adjudges that the party has used due diligence; that if the nearest post office be unknown, and cannot be ascertained upon such inquiry, notice sent to that which, on such inquiry, is believed to be nearest, will suffice, and the endorser will be bound whether he receives it or not, and this although a party to the bill may know where the indorser resides.

The jury found for the plaintiff below, and the defendant prosecuted a writ of error.

REESE J. delivered the opinion of the court.

April 13.

This is the same case which was before the court in 1836, and which is reported in 9 Yerger Rep. 253. The attitude of the parties is now changed, however, the plaintiff below having recovered a judgment, which he had failed to do on the previous trial. The present record varies from the former in this respect only, that the fact appears now to have been proven to the jury, though not before, that one of the holders of the note knew the residence of the indorser, at the time of its dishonor. And it is insisted, that knowing that fact, neither the parties nor their agent, the notary public, could affect him with notice of the protest by directing it to any post office other than the nearest to his residence, however diligent they may have been in their inquiries, at the place where the note was payable, if the result of such diligent inquiry should lead to a direction of the notice to any post office other than the nearest.

In by far the greatest number of cases between parties to commercial paper, the residence of a party being known, his post office is known also, because designated by the same

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name and place. But residences in the country may be known, and still the question of greater or less proximity to the country or village post office in the neighborhood of the residence remain one of much doubt and difficulty. The residence is a question of fact, and if due diligence be used and information be sought from the usual and proper sources, and the party confiding reasonably in the information received, direct to a post office, which turns out not to be the one nearest to the residence of the person to be affected by such notice, he shall be excused on account of the diligence used, and the party to whom notice was to be given shall be affected thereby.

This question is substantially involved in the cases reported in 9 Yerger, 253; 7 Yerger, 305; and 5 Yerger, 67; and the principles we consider as settled by these cases. The very point is raised in the case of *Davis vs. Williams*, reported in Peck, 191, and we consider that case as having determined the principle in the same manner. That was a case agreed, and the court being clothed with the powers both of a court and jury, determined, that upon the facts of that case, indeed, the proper degree of diligence was not used; because they thought that to ascertain the question of proximity of post office to the known residence of Williams, the indorser, certain sources of information should be resorted to, namely, maps and post office documents, the importance of which as calculated to establish the fact we think was overrated by the court. But still the court in that case place the question upon the proper ground, that of diligence or the want of it, in attempting to ascertain correct information.

Upon this ground the circuit court placed the cause before us in the charge to the jury. The verdict which they formed thereon, the court below refused to disturb, and a majority of the court believing that there is no error in the judgment of the circuit court, direct it to be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE, JUNE TERM, 1838.

GREENWAY vs. HUNTER.

EXECUTORS AND ADMINISTRATORS. *Limitation of actions against by et's.*
1789, c 23, 1829, c 57, and 1831, c 123.

The acts of 1829, and 1831, prohibiting suits against personal representatives, for six months from their qualification, do not, that long, extend the periods within which, by the act of 1789, they must be sued, and must close their administration.

Alfred Hunter, in his life time, was indebted by bills single to Greenway, in the sum of four hundred and thirty-one dollars, sixty-four and a half cents. Hunter died, and administration of his estate was granted by the county court of Green to Elizabeth Hunter, the defendant, on the 28th of October, 1833. On the 26th of March, 1836, Greenway sued the administratrix in debt on said bills, in the circuit court of Hawkins. She pleaded payment by the intestate, fully administered, and the statute of 1789, c 23, § 4, limiting actions against executors and administrators. Upon the two first pleas issues of fact were joined. To the last, the plaintiff demurred upon the ground, that as the acts of 1829, c 57, § 2, and 1831, c 23, § 2, prohibit suits against per-

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sonal representatives within six months from their qualification, the periods of two and three years within which actions against them, are limited to be brought by the act of 1789, does not begin to run till the expiration of said period of six months. The defendant joined in demurrer; and at August term, 1837, his Honor, the circuit Judge overruled it, and gave judgment for the defendant, that the plea was a bar to the action. The plaintiff appealed in error.

LUCKY, for the plaintiff.

R. J. MCKINNEY, for the defendant.

REESE, J. delivered the opinion of the court.

June 6. We are called upon, by the question raised upon this record, to determine—whether the act of 1831, c 23, prohibiting the institution of a suit against the personal representative of a decedent within six months from his qualification, has the effect to extend six months longer, the time (two years prescribed by the act of 1789, c 23,) within which, the administration must be closed, and within which, actions against personal representatives, are barred.

We are satisfied, that the act of 1831 can have no such effect. The object of that act, in protecting the personal representative, for six months, against the institution of suits, was, to enable him, more effectually, and with more safety to close his administration, within the time prescribed by the act of 1789. Within the six months, the creditor has a right to exhibit his claims for settlement and payment, and the representative can adjust or pay them; both parties can inform themselves of the liabilities and means of the estate, and of the precedence, to which creditors may be entitled, in the liquidation of their claims; and so far from this state of things making a prolongation of the time, for the administration, necessary, its effect perhaps, is of a contrary character.

This point has been, more than once, incidentally determined, in cases, heretofore, before this court. But we are glad that the question has been distinctly made; for the act of 1789 is one of much importance, and it has, so repeatedly, and in so many aspects, been presented for judicial

exposition, that it is desirable, that all questions, with regard to it, should be finally settled.

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It has been argued, in this case, that, to give to the act of 1831, the effect of prolonging, for six months, the time in which claims against a personal representative shall be barred, and yet, hold him liable to close his administration, at the end of two years, would place him in a most difficult and perilous situation; and yet it has not been contended that the act of 1831 can have the effect to extend the time within which the administration must be terminated.

We entertain, therefore, no doubt of the correctness of the judgment of the circuit court, and it must be affirmed.

NOTE. The limitation of actions against personal representatives takes effect—

1. Against a creditor, in being, 3 Murphy, 595—6; 3 Devereaux, 181; who having a debt due, 3 Yerger, 318, 9 *Id.* 433, is therefore capable of suing.
2. In behalf of a deceased debtor's personal representative, who having qualified, and survived six months, 1829, c 57, 1831, c 23; is therefore capable of being sued, 10 Yerger, 484.
3. In *two* years from the qualification, if the creditor reside within, and *three* years, if without the state, at the time, 10 Yerger, 484, of the death or qualification, not counting the time of a definite indulgence granted to the debtor's representative, at his special request, 9 Yerger, 433.
4. Or in one year after the creditor's disability is removed, if an infant, *some* *covert*, or *non compos*, at the time of the qualification, 5 Haywood, 236.
5. And it will take effect whether the advertisement, mentioned in the 5th section, of the act of 1789, be made or omitted, 5 Haywood, 1, 224; 3 Yerger, 1, 431, that section only being directory.

HOUSTON vs. DYCHE.

SALE OF CHATTELS. *Conversion by conditional vendes and buyer from him.* Upon the delivery of a chattel from A to B, if an agreement be made between them—"That the property shall remain in A, and the possession and use be enjoyed by B; and if by a limited time B do for A certain work, the property shall become B's"—such agreement is legal.

In such case, if B sell the chattel he is guilty of a conversion, and so is the buyer if he knew the facts; and if he did not, when he is informed of them, if he use the chattel, and say that A must look to B, that is a conversion, and a demand need not be proved.

SAME. *Evidence in trover—demand and refusal—conversion.* Where the right of property in a chattel is in one person, and the possession rightfully in another—as by some species of bailment or the like—a demand will put an end to the possession; and in such case, refusal is evidence of a conversion; but it is unnecessary either to make or prove a demand and refusal, where there is other evidence of a conversion.

This action of trover for a horse was tried at the July term, 1837, of the circuit court of Green, before his Honor Judge POWELL of the first circuit. The facts submitted, and the instruction given by the court to the jury are stated in the opinion of the court with sufficient fullness.

PECK for plaintiff in error.

R. J. MCKINNEY for defendant.

GREEN, J. delivered the opinion of the court.

June 7. This is an action of *trover*, brought by Dyche against Houston for a horse.

The facts of the case are as follows:—Dyche agreed with one Henderson, that if Henderson would clear for him eighteen acres of land, within a time limited, he should have the horse in controversy,—but the horse was to remain the absolute property of Dyche until the work should be completed. The horse was put into the possession of Henderson, who abandoned the work without completing it, and sold the horse to one Kent, who sold him to the defendant Houston. Houston claimed and used the horse as his own, and declared that Dyche must look to Henderson for his pay.

The court charged the jury, among other things—"That, if the horse was to be Dyche's property until the clearing was finished, and that was not done, his right was not divested by the delivery of the horse to Henderson, to be used by him,

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v.
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and that a demand was only evidence of a conversion, and not necessary to be proved where there was an actual conversion." This charge of the court, we think, was strictly correct.

It is insisted by the counsel for the plaintiff in error, that where goods come to the hands of a party by delivery, finding or bailment, an actual demand and refusal must be proved. This position is certainly correct where there is no evidence of an actual conversion. In such case, a refusal to deliver the goods, when demanded, would be the only evidence of a conversion; and, as the plaintiff must prove a conversion of the property by the defendant, in the absence of other evidence of that fact, a demand and refusal to deliver it must be proved. But there is certainly no necessity for other proof, the only effect of which, is, to establish the fact of a conversion, when that fact is sufficiently established by other evidence, 2 Selw. N. P. 543; 1 Leigh, 86. So also, in Chitty's Bl. 179, it is laid down, that "proof of the wrongful act of the defendant is sufficient to establish a conversion without evidence of a demand of the goods, and a refusal to restore them." In the case of *Carraway vs. Burbank*, 1 *Devereaux*, 305, 2 Sel. N. P. 543, note Y, it is decided, that every act of ownership inconsistent with the rights of others, is a conversion.

The application of these principles to the case under consideration, will clearly sustain the judgment of the court below. Houston *purchased* the horse from Kent, used him as his own, and said that Dyche must look to Henderson for his pay. There could not be more decisive evidence of a conversion, and there was, therefore, no necessity for proof of a demand of, and refusal to deliver the horse to establish that fact.

Let the judgment be affirmed.

NOTE. See post. *Gambling vs. Reed*.

MASSY vs. SHIELDS.

PLEADING. *Condition precedent.* In a covenant to cut a certain number of cords of wood, at any place the covenantee sees proper, these latter words do not impose it on the covenantee, as a condition precedent, to seek the covenantor and give him notice of the place; and a plea of want of notice, not averring that the covenantor offered to commence the work and desired to be shown the place, and continued ready, &c. is bad upon demurrer.*

This was an action of covenant founded upon the instrument copied in the opinion of the court. It stood upon a demurrer to the plea filed by the defendant to the declaration. The demurrer was sustained by Judge POWELL, of the first circuit, at January special term, 1837, of Green circuit court, and a writ of inquiry awarded, which was executed at March Term, 1837. The defendant appealed in error.

ARNOLD and PECK, for the plaintiff in error.

R. J. MCKINNEY, for defendant in error.

GREEN, J. delivered the opinion of the court.

June 7. This action is founded upon the following instrument of writing, viz. "One day after date I promise to cut and cord four hundred and twenty cord, good merchantable wood, for David Shields & Co., at any place they may see proper, for value received, this 21st day of July, 1834.

"STEPHEN MASSY."

The declaration sets out the covenant, and alleges, that the defendant had broken the same in not having cut said wood, as he was bound by his covenant to do. To this declaration the defendant pleaded, that the plaintiff never made any demand on him to cut the wood nor gave him notice of the place where he saw proper to have the wood cut. To this plea the plaintiff demurred, and the demurrer was sustained by the court.

It is now insisted, that this judgment was erroneous, because it was incumbent upon the plaintiff to designate the place where the wood should be cut, as a condition prece-

* The plea should have been, that *paratus fuit et obtulit*, was ready and offered to cut the wood one day after, &c., but the plaintiff did not show him the place, &c., and that the defendant from thence hitherto had been and still was ready, &c., Com. Dig. Plead. (C 61); (2 V 13); 2 Saund. 352.

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dent to the performance of the work by the defendant, and that the performance of such precedent condition must be averred and proved in order to entitle the plaintiff to recover.

It is certainly true, that where, in a covenant, a precedent condition exists, the party whose duty it is to perform it, must aver and prove its performance before he can recover for the non-performance of the subsequent condition. But we do not think there is such precedent condition in this contract.

The defendant undertook to cut the wood for Shields & Co., at any place they might see proper. We must construe this covenant according to the natural order in which the parties would act in fulfilment of it. Shields had no power to control Massy's actions, or to cause him to go to the place where it was desired the wood should be cut, in order that it might be pointed out to him. Massy may have gone off immediately after affixing his signature to the writing; and it certainly never was intended by the parties that Shields should send him a written notice to cut the wood, designating therein the place where it was to be cut. The idea that such notice was to be given, is negatived by the fact, that the 420 cords of wood were to be cut one day after the date of the covenant, thus specifying in the contract the time when it was to be performed. Nor would it have been easy to designate, in a written notice, the place where it was desired the wood should be cut, with such accuracy as would enable Massy certainly to cut it, where the obligees saw proper. These remarks are made, that it may the more plainly appear that the stipulation, that the wood should be cut where Shields might see proper, does not constitute a condition precedent on the part of Shields to show the place.

Shields was not bound to act until Massy should come and offer to commence the work and desire to be shown where it was to be performed. Had he done so, and Shields had then failed to show the place, he would have been excused, provided he had continued ready to perform the work whenever the place should be pointed out. We think, therefore, the plea is bad, and that the demurrer was properly sustained.

Affirm the judgment.

REED vs. MOORE, et. al.

PLEADING. *Plea in bar must answer the whole gravamen.* A plea in bar, pleaded to the whole declaration, must contain a sufficient answer in law to the *whole* gravamen, or cause of action: otherwise it is ill for the whole; and the plaintiff is entitled to recover for the *whole*. Gould's Pl. c. 6, § 98. and authorities there cited.

SAME. *When plea answers only part how to except to it.* Where matter, pleaded as an answer to the whole, is in law a good answer to a *part only*, the proper mode of excepting to it is by *demurrer*. Id. Ibid. § 104, subsec 1; 1 Saund. 28. (n. 3).

SAME. *Same—usury.* Therefore as a usurious contract is not void *in toto*, but only for the excess of usurious interest; if a defendant, who is sued on such contract, plead the usury as an answer to the *whole* demand, it is bad on general demurrer, and the plaintiff will be entitled to judgment for the whole.

Charles and Solomon Reed, on the 15th of April, 1820, executed their bill single to Joseph Hurley, of whom the defendants in error were administrators, for the payment, three days after the date, of seventy dollars and seventy-five cents for value received. The defendants in error sued Solomon Reed upon this bill in Greene circuit court, on the 29th of August, 1836. He craved oyer of the bill, and of certain payments endorsed, and then "for plea in this behalf said, that he executed the said note as the security of said Charles Reed; that the consideration given and paid to the said Charles was the sum of thirty-seven dollars and fifty cents, and no more, by way of loan, from the said Joseph Hurley to the said Charles; and that upon such advance and loan, said Hurley corruptly took and exacted usuriously of and from said Charles, the sum of thirty-three dollars twenty-five cents, by way of interest, and for forbearance for three days of payment of said sum of \$ 37 50 c., which said sum was included in said note. And so said defendant says the said contract was usurious for the sum of \$33 25 c., part of said \$ 70 75 c., included in said note. All which he is ready to verify; wherefore he prays judgment, if plaintiffs their action shall have and maintain." The plaintiffs demurred to this plea, and defendant joined in demurrer.

At November term, 1837, his Honor Judge POWELL, of the first circuit, sustained the demurrer, and the defendant not asking leave to amend, gave judgment for the whole debt

of \$70 75 cents, and interest and costs, from which judgment the defendant appealed in error.

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v.
Moore.

ARNOLD, for plaintiff in error.

R. J. MCKINNEY, for defendant in error.

TURLEY, J. delivered the opinion of the court.

June 7.

This is an action of debt to which the defendant has pleaded in bar, that the contract on which it is founded is usurious for the sum of thirty-three dollars twenty-five cents.

This plea it is contended is bad upon general demurrer, and we think correctly. A usurious contract is not void *in toto*, but only for the excess of usurious interest. The matter of the plea then is not a bar to the whole cause of action, but only to so much as is usurious. That a plea is bad upon general demurrer, which purports to answer the whole cause of action, but can by law only be an answer to a part, is too plain a proposition to be discussed.

The form of this plea is a bar to the whole cause of action, the commencement is, "for plea in this behalf says," and the conclusion is, "wherefore he prays judgment, if the plaintiff his action shall have and maintain." If issue had been joined upon this plea, and it had been found for the defendant, the plaintiff could not have had judgment for this debt with legal interest.

The form of the plea should have been "for plea as to the sum of \$33 25 cents, a part of the plaintiff's cause of action says," and in the conclusion, "wherefore he prays judgment if the plaintiff his action aforesaid for the said sum of \$33 25 cents, shall have and maintain." To a plea in this form the plaintiff might have replied and taken issue upon the question of usury and have had judgment by *nil dicti* for his debt with legal interest.

We therefore think there is no error in this case, and affirm the judgment of the court below.

BLEVINS vs. THE STATE.

INDICTMENT. *Entry of juror's return—ambiguity.* If an indictment be preferred against two, for a certain offence, and the record shows, that the grand jury came into open court, in a body, and returned a bill of indictment against one of them, for the same offence, upon which he is afterwards arraigned, tried and convicted, the judgment will not be arrested on account of this ambiguity in the record,—for the fact that the indictment was preferred against two does not make it the less an indictment against one of the two.

SAME. *Same.* The principle settled in *Chappel vs. The State*, 8 Yerger, 166, —that no less evidence than record evidence can be received to establish the fact, that the accused has been indicted in due form by the grand jury—approved, but stated to be upon the very verge of the law.

A bill of indictment was preferred by BRABSON, attorney general for the first solicitorial district, to the grand jury of Johnson, against John L. Blevins and Armistead Blevins, for an assault and battery upon the body of William C. Blevins. It was indorsed as follows—"Indictment, *State vs. John L. Blevins, Armistead Blevins*, Assault and battery, William C Blevins, prosecutor; witnesses, William C. Blevins, Jesse Cole sworn and sent to the grand jury, this 29th day November, 1837. A. D. Smith, Clerk." "A true bill, G. Moore, foreman G. J."

The finding of the bill by the grand jury was entered upon the record in the following manner:—

"State v. Jno. L. Blevins. Indictment for assault and battery, William C. Blevins, prosecutor. In this cause the grand jury in a body came into court, and returned a bill of indictment against John L. Blevins for an assault and battery, indorsed by the foreman thereof, a true bill."

After a plea to the jurisdiction of the court, pleaded in proper person, and signed and sworn to by both, had been overruled on demurrer, the defendants both pleaded not guilty, and were convicted. They thereupon moved in arrest of judgment, that the record did not show the finding of any bill of indictment against them by the grand jury. His Honor, Judge POWELL, of the first circuit, before whom the cause was tried at March term of Johnson circuit court, 1837, discharged the motion in arrest of judgment as to John L. Blevins, and pronounced judgment upon him. He thereupon appealed in error; and the question was—whether the

bill of indictment, the finding of which as to one is mentioned in the record, could be taken by intendment for the same which was preferred against two?

Blevins
v.
The State.

GREEN, J. delivered the opinion of the court.

June 8th.

In this case, an indictment was preferred against John L. Blevins and Armistead Blevins, for an assault and battery. The record shows that the grand jury came into open court in a body, and returned a bill of indictment against John L. Blevins, for an assault and battery, a true bill. It is insisted that from this entry it does not appear, that the indictment against John L. and Armistead Blevins, upon which the said John L. was afterwards tried, was the one which was before the grand jury, and which was found a true bill; and that upon the authority of the case of *Chappell vs. The State*, 8 Yer. 166, the judgment ought to have been arrested. We think this entry of record sufficiently describes the indictment upon which the defendant was tried, to make it certain to a reasonable intent that it was the one, which had been found a true bill by the grand jury. It was strictly an indictment against John L. Blevins, and the fact that another was charged in the same indictment, does not make it the less an indictment against the defendant. Although we adhere to the principle settled in the case of *Chappell vs. The State*, yet we concur with the attorney general that it goes to the very verge of the law.

Affirm the judgment.

NOTE.—*Chappell vs. The State* decides that the indictment and endorsement of the grand jury do not become part of the record, by being returned into court, received and filed, unless the fact of the return, receiving and filing be noticed of record, 8 Yer. 170, 171.—*Quere.*

DODGE vs. BRITTAIN.

NEW TRIAL. *Practice.* The Court of Errors will not grant a new trial if there be any proof by which the verdict can be sustained.

MALICIOUS PROSECUTION. *Malice and want of probable cause must concur.*—If an innocent man be maliciously prosecuted for a felony, he cannot maintain the action of malicious prosecution, if there is probable cause for preferring the charge; and it would be error so to charge the jury as to lead them to the inference, that in the court's opinion the plaintiff was entitled to a verdict unless guilty.

LARCENY. *Essence of it.* Receiving goods with the owner's consent, from his slave, is not larceny, it being of the essence of the offence, that the goods be taken against the will of the owner,—*invito domino*. See Foster, 123; 2 Russell, 93, 116, 3d Am. Ed.

Dodge caused Brittain, a female, to be arrested on a justice's warrant upon a charge of larceny. She was recognized to appear in the circuit court of Washington, at March term, 1835, to answer the accusation. There Dodge had a bill of indictment preferred to the grand jury, charging her with stealing and with receiving stolen goods; but the jury refused to find it, and she was discharged. She thereupon sued him in an action of trespass on the case for a malicious prosecution at September term, 1835. He pleaded not guilty; and on the trial, at July term, 1837, before POWELL, Judge of the first circuit, and a jury of Washington, the plaintiff below read the proceedings on the criminal charge, and introduced testimony tending to prove an *alibi*, and that she had sustained a good character. The testimony of the defendant below tended to prove that the plaintiff had received the lost goods from one of the defendant's slaves, by means of whom the defendant had attempted to entrap the plaintiff, whom he had previously suspected of similar practices; and also to prove that the plaintiff had not maintained an unblemished character. The jury found a verdict for the plaintiff below, and the defendant moved for a new trial, which having been refused by the court, he appealed in error. Those portions of the charge of his Honor, the circuit judge, to the jury, which were debated in this court, are stated in the opinion of the court.

TURLEY J. delivered the opinion of the court.

June 8. This is an action for a malicious prosecution, in which the plaintiff below recovered a judgment for the sum of five

hundred and fifty dollars; which judgment is sought to be reversed, because the verdict of the jury is contrary to the evidence, and because the law was erroneously expounded by the court.

Dodge
v.
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Whatever may be the hardship of this case, on the part of the plaintiff in error, it is impossible for us to relieve him, upon the facts as stated in the bill of exceptions. We cannot say that the verdict is not warranted by the evidence. The jury were the proper judges of the credibility of the witnesses, and of the weight of the testimony, and this is not a case in which all the proof is on one side, and we have repeatedly said, that we will not reverse if there be any proof, by which the verdict can be sustained.

The question then is, was the charge of the court correct? It is assailed on two grounds, 1—because the court said to the jury, "It was alledged, on the one side, that a felony had been committed, and on the other, that the whole matter was a false conspiracy, supported by perjury, the court would leave it to the jury, on the whole evidence, to determine how the truth was: if, as alledged, on behalf of the defendant, a felony had been committed, plaintiff could not recover: if, on the other hand, it were all false, the plaintiff should recover; and the jury were the sole judges of what damages should be given." We are not able to perceive any error in this part of the charge. The court states to the jury the point in controversy arising out of the testimony, viz., that the defendant contends that the plaintiff is guilty of the felony charged, and the plaintiff, that she is innocent, and that the charge is got up by a conspiracy by the defendant and others, and is supported by perjury. Whether this be so or not, the court very properly says, is a question for the determination of the jury, depending upon the facts proven, and the fair deductions to be drawn from them; and the proposition is most unquestionably true, that if the plaintiff were guilty of the felony charged, she had no cause of action, but that if the charge originated in a conspiracy, and was supported by perjury, she was entitled to a verdict, and to such damages as the jury, in their discretion, might think proper to allow. If it resulted as a necessary consequence, from this part of

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the charge, that the plaintiff, unless she were guilty of the felony, was, in the opinion of the court, entitled to a verdict, it would be erroneous. But no such consequence follows, because the court expressly says, in that part of the charge immediately preceding, "that a party might have probable cause to institute a prosecution for felony against an innocent person, and, in that case, no action could be maintained."

2. It is said, that the charge is erroneous, because the court said to the jury, "If defendant agreed or consented that the negro should let the plaintiff have the bacon, it would not have been, under the circumstances, a felony in plaintiff to have taken or received it, but that it would be a matter proper to be taken into consideration in mitigation of damages."

The truth of this proposition is equally as evident as that of the first. No larceny can be committed of property, the possession of which the owner parts from voluntarily. All the authorities are express upon the point, that to constitute the crime of larceny, possession of the property must be taken by the thief *invito domino*.

The charge does not contradict the principles of the cases referred to by the counsel for the plaintiff in error. They, none of them, go further than to say, that a man may direct a servant to appear to encourage the design of the thieves, and lead them on till the offence is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed; that a servant, by the desire of his master, may show thieves, breaking into the house for plunder, where the plate is kept, and if they remove it, they are guilty of larceny; and that if a man is suspected of an intent to steal, and another, to try him, leaves property in his way, which he takes, he is guilty of larceny. In all these cases, the possession of the property remains with the owner, and a trespass is committed in the taking by the thief. But such would not be the case, if the master had directed the servant to deliver the property to the thief, instead of directing him to furnish facilities for his arriving at the place where it was kept.

There is then, in our opinion, no error in this case, and we affirm the judgment of the court below.

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NOTE.—In the Civil Law, when an act is said to be done *per injuriam*, injuriously, it is equivalent to wilfully, maliciously, and unlawfully, these being the ingredients of *injuria*. There the *actio injuriarum* embraced most, if not all, of our actions of trespass and trespass on the case. It was of course the remedy for that particular class of injuries, which are redressed with us, by the action on the case for malicious prosecution. These injuries are assigned, in that system as in ours, to the class of wrongs to the *character* of the party aggrieved. Because, as some degree of infamy is ascribed to the temper of mind which leads its possessor to neglect, or refuse to perform, or to violate, his civil duties and obligations, unless legally compelled thereto, so to impute it to a man by suing him maliciously and without probable cause, is treated, in both systems, as a species of defamation.

By the Civil Law, this action lay, in general, for wilfully, maliciously, and unlawfully suing a man in any tribunal merely for vexation; and also in the following particular cases, namely, for putting seals, without a judicial order, on an absent debtor's house with intent to injure him; for refusing to receive sufficient or justified bail to an action; for suing sureties with intent to injure the principal, knowing him to be prepared to pay, &c.; for suing as his debtor, one known to the plaintiff not to be his debtor; for advertising a thing for sale in the character of a pledge received from a party from whom it had not been so received, for the purpose of injuring his credit or character, &c.

In all these cases, three things must have concurred to make the act done an actionable injury. It must have been done, 1. *voluntate injurie*, 2. *in despectum personæ*, 3. *non jure*; that is, wilfully, maliciously and unlawfully, or without probable cause. As to the necessity of the ingredient of *malice* in this species of action, there is a class of cases in the English books well adapted for illustration. They were actions for omitting to countermand process already issued, after the debtor had settled the demand. *Scheibel vs. Fairbairn*, 1 Bos. & Pul. 388, is the leading case, and it was followed by *Gibson vs. Chaters*, 2 Bos. & Pul. 129, and *Page vs. Wiple*, 3 East, 314, in all of which it was held that malice was indispensable to the sustaining of the action. Cooper's Justinian, 629; *Fail vs. Lewis*, 4 John R. 450; Pothier's Pandects, Book 47, Title 10; Justinian's Institutes, Book 4, Tit. 4, § 1.

But besides being done maliciously, the act must also have been done, *non jure*,—unlawfully—without probable cause. What is probable cause? Circumstances and facts sufficiently strong to excite in a reasonable mind suspicion that the person charged was guilty, per Judge Washington in *Munus vs. Dupont*, 2 Brown's R. App. 65, cited 3 Dev. R. 455; adequate and reasonable ground for setting on foot the inquiry, 1 Chitty's Genl. Pr. 49; good cause to think the party guilty, per Judge White, Cooke's R. 103.

The *onus* of proving want of probable cause lies on the acquitted defendant, 1 Chitty's Genl. Pr. 50, note (f) and authorities cited. Whether the judge ought to leave it to the jury whether there was probable cause, see Chitty in the place cited, 2 Barn. & Adol. 845, 857, 22 Eng. Com. L. R. 195, *Kellon vs. Bevins*, Cooke's Rep. 90, 107; 2 Yer. 328, *Williams vs. Norwood*, in which case at page 334, it is stated by Judge Whyte, from Campbell's R., "that where the facts to show probable cause are ascertained, whether they amount to a defence or not, is to be decided by the judge."

RODGERS vs. ELLISON.

IDIOT AND LUNATIC. *How to be sued.* An action at law cannot be sustained against a person in the character of guardian of a lunatic, without joining the *non compos* in the action as a party defendant. 2 Saund. 333, n 4.

SAME. *Pleading—misjoinder.* If a count against a party as guardian of a lunatic be joined with one against him in his own right, it is a misjoinder, and may be excepted to by demurrer, or in arrest of judgment.

Samuel Smith, who had a considerable estate left him by his deceased father, which had come into the hands of his brother Henry Smith, was committed to the jail of Cocke county as a dangerous lunatic, according to the act of 1797, c 41, § 2, by the order of three justices, on the 27th of June, 1833, where he remained till the 26th of November following, being one hundred and fifty-four days. His board, washing, &c. during his confinement, amounted to \$65 12½ cents. Ellison, the intestate of the defendant in error, was jailer, and this action of *assumpsit* was brought by him, in his life time, in Cocke county court, on the 18th of January, 1834, against Rodgers, who was guardian of the lunatic, to recover said sum of \$65 12½ cents.

The declaration, as filed in the county court, contained three counts, all of them against Rodgers as guardian. He pleaded, 1—*non assumpsit*, upon which plea issue was joined; 2—That he had not, at the commencement of the action, nor at any other time, any of the estate of the lunatic in his hands, to which there was a demurrer and joinder. The court sustained the demurrer; and on the trial of the issue, the plaintiff had a verdict and judgment for the amount of his demand.

Rodgers appealed to the circuit court of Cocke, where the plaintiff was allowed to file an additional count, against the guardian in his own right averring his promise to pay, &c., in consideration of forbearance. The case was tried at January term, 1838, before his Honor Judge ANDERSON, of the 12th circuit, and a jury of Cocke. The defendant in error obtained a verdict. Rodgers moved for a new trial, which his honor refused. He filed reasons in arrest of judgment, 1. That the action was misconceived, and could not

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be maintained against him as guardian, 2. That there is a misjoinder of counts in the declaration, 3. That the verdict is wholly unauthorised by law. These were overruled, and his Honor gave judgment, that the plaintiff below recover, &c. The defendant appealed in error.

R. J. McKINNEY, for the plaintiff in error, insisted, 1. That the defendant, as guardian, was not liable to be sued; that if plaintiff had cause of action against any one, which he denied, the suit should have been against Smith, not against his guardian, therefore judgment on the demurrer, in the county court, should have been rendered in favor of defendant; that an idiot must sue and defend in person,—a lunatic sues and defends in the same manner as other persons, if of age, by attorney,—if within age, by guardian, 3 Thomas' Co. Litt. 394, marg.; 2 Sid. R. 112, 355; 3 Bac. Abr. 541; 4 Com. Dig. Idiot and Lunatic; 2 Archbold's Pr. 164; 2 Law Library, 250, 258, at top.

2. That the circuit court erred in permitting the fourth count to be filed—it was a misjoinder, and for this the judgment should have been arrested, 1 Chitty's Pl. 200, 206.

3. That the promise alledged in the fourth count is not supported by the proof; but were it otherwise, upon the facts of this case, it could not avail the plaintiffs. There being no legal cause of action against any one, the promise to pay on forbearance to sue is void; and it was not binding, because the defendant having no effects in his hands, it should have been in writing.

ARNOLD, for the defendant in error, said that if a lunatic sue, it must be in his own name; and if he be sued, he is to appear by attorney, if of full age, and by guardian if he be under age; otherwise of an idiot, in support of which he cited Co. Lit. 135. b. The committee of a lunatic was relieved against a debt assigned by the lunatic without consideration, by bill in equity without making the lunatic a party. 1 Ch. Ca. 113; 2 John Ch. R. 232; 3 Bac. Ab. Idiot and Lunatic, G.

He also contended, that there was no misjoinder of counts in the case; that a declaration against an administrator may contain a count against him in his representative capacity, and

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one against him in his own right, founded as here, on his promise to pay.

REESE, J. delivered the opinion of the court.

June 7.

The question raised by the record in this case, and discussed at the bar, is whether the guardian or executor of a lunatic can be sued in an action at law, in that character, without joining in the action, as a party defendant, the lunatic himself? It is well settled in England, that at law the *non compos* himself must be a party plaintiff when suing, and a party defendant when sued. Upon this question there has never in their courts been any controversy whatever. As to the property of the lunatic, the guardian being but a steward, bailiff, or agent, it does not vest in him, but remains, so far as title is concerned, in the lunatic himself.

The formal service of process, indeed, upon one deprived of his reason, may appear not without some degree of absurdity. But that he should be a party, so that the judgment may be rendered against him, and the execution issue against his estate, involves not only no absurdity, but is very proper and necessary. To render the judgment against the guardian, and issue the execution against his estate, would involve in it not absurdity only, but injustice.

The precedents referred to in chancery cases, and in Johnson's Chancery reports, where it was held, that the lunatic need not be made a party, are very distinguishable from cases at law.

In England and New York, when the estate of a lunatic is in the custody of the chancery court, a suit in that court against the lunatic, is but a suit against the fund. It is a petition to the chancery court, in whose hands the fund is, to pay the debt out of that fund.

We think our act of assembly, on the subject of lunatics, contains no provisions which can change the course of proceeding at law, as fixed by the common law, so as to dispense with the necessity of instituting the suit against the lunatic himself.

We are also of opinion, that the additional count in the declaration, filed by leave in the circuit court, against the

guardian personally, constitutes a misjoinder. We are of opinion, therefore, upon both these grounds, without advert- Rodgers
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The judgment of the circuit court must be reversed, and judgment given in favor of the plaintiff in error.

THE STATE vs. McCANN.

CRIMINAL LAW. Practice—indictment—presentment—prosecutor. It is not essential that the record show, by any order or memorandum, that the indictment is founded upon the presentment. If it appears that there had been a presentment made against the same individual for the identical same offence, for which he was indicted, *that* will be sufficient to show that the indictment was founded upon the presentment, and to excuse the attorney general from the obligation to mark a prosecutor. Ruled accordingly, *McHenry vs. The State*, Knoxville, June term, 1837, not reported.

The matter of this record from the circuit court of Johnson, after the usual caption, is of the following purport, and stands in the following order. 1. A memorandum of the grand jury's returning into court a *bill of indictment* against Michael McCann, the defendant in error, and James McCann for obstructing a public road. 2. A presentment purporting to be made by the grand jury against the same persons for the same offence, signed by all the grand jury, but *not accompanied with any notice of record of its having been made*. 3. An indictment, purporting to have been preferred by BRABSON, attorney general for the first solicitorial district, against the same persons for the offence described in the presentment, endorsed—"a true bill," and signed by the foreman of the grand jury, but *without any prosecutor marked thereon*. The foregoing appears as of November term, 1836. 4. Then follows as of March term, 1837, an entry of the appearance of the defendant in error, Michael McCann, his plea of not guilty, and a similitur on behalf of the state. 5. of the same term, the defendant's recognizance to appear at the next term. 6. As of July term, 1837, an entry of leave granted, on the defendant's motion for cause shown by affi-

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davit, to withdraw the plea of not guilty, and of a rule to show cause why the indictment should be quashed, "because no prosecutor was marked on the back thereof;" argument of the rule, judgment thereon, that the indictment be quashed and the defendant discharged, and appeal in error by the attorney general to the supreme court,—all in one entry.

GEO. S. YERGER, attorney general for the state.

NELSON and LUCKY for the defendant. The record in this case shows that the grand jury returned into court a bill of indictment against the defendant for obstructing a public road. A presentment against the defendant for the same offence, is also incorporated into the record; but the indictment does not purport to be founded on the presentment, nor does the record show that the grand jury returned the presentment into court. No prosecutor is marked on the indictment, which was quashed, on motion, in the circuit court.

The only question presented in this case is, was it necessary, upon this state of facts, that a prosecutor should have been marked upon the indictment? To show that it was, we rely upon the act of 1801, c 30, and *Chappel vs. The State*, 8 Yer. 170.

GREEN, J. delivered the opinion of the court.

June 9.

This is an indictment for obstructing a public road. The only question is, whether there should have been a prosecutor marked upon the indictment.

The record contains a copy of the presentment against the same party for the same offence, and if the indictment is founded on this presentment, there is no doubt but that it is properly prosecuted without a prosecutor having been marked thereon. But it is insisted, and so the court below thought, that there is nothing in the record showing that the indictment is founded upon the presentment.

This court, at the last term, in the case of *McHenry vs. The State*, decided that it is not essential that the record show by any order or memorandum, that the indictment is founded upon the presentment; but that if it appear, that there had been a presentment made against the same individual, for the identical offence for which he was indicted,

that will be sufficient to show that the indictment was founded upon the presentment, and to excuse the attorney general from the obligation to mark a prosecutor.

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We still adhere to that opinion, and therefore think the court below erred in quashing the indictment in this case.

Reverse the judgment and remand the cause for a trial to be had therein.

BARKLEY vs. THE STATE.

RECOGNIZANCE *Filing in court, effect of.* The filing, in a court of record, by a magistrate, of a recognizance, purporting to have been taken before him, makes it part of the Court's proceeding, and communicates to it the dignity and verity, which, by law, appertain to records.

SAME: Same—Pleading. The verity of a recognizance, so filed, cannot be questioned by the plea of *non est factum*; and if such plea be put in, it is demurrable.

An indictment had been found in the county court of Greene against Samuel Barkley, for an assault and battery. He and the plaintiff in error, William Barkley, as his bail, acknowledged a recognizance before a justice of Greene, on the 29th of August, 1835, conditioned for said Samuel's appearance in the county court, to answer "the complaint of the state against him for an assault and battery as charged in the bill of indictment," &c. This recognizance was forfeited, and to the *scire facias* issued thereupon, the plaintiff in error appeared, and instead of pleading *nul tiel record*, filed the plea of *non est factum*, to which the attorney general demurred. The county court sustained the demurrer, and gave judgment for the penalty. The plaintiff in error appealed to the circuit court of Greene, where, at the March term, 1837, the judgment of the county court was affirmed, from which judgment of affirmance this appeal in error was prosecuted.

The question was, whether when a recognizance is taken by a justice and returned into a court of record, it becomes so invested with the qualities of a record, as that its verity can only be assailed by the plea of *nul tiel record*?

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GEORGE S. YERGER, attorney general for the State.
ARNOLD, for the plaintiff in error.

REESE, J. delivered the opinion of the court.

June 11. A justice of the peace filed in the county court a recognizance taken before him, of the plaintiff in error, and a certain Samuel L. Barclay, for the appearance of the latter in said court, to answer a criminal charge. A forfeiture having been taken thereon, the plaintiff in error, on the return of a *scire facias*, filed a plea of *non est factum*, or that he had not entered into the recognizance. To this plea was filed a demurrer. The county court sustained the demurrer, and their judgment was affirmed by the circuit court. And the only question now is, whether this plea was a legal and proper defence?

We are satisfied that it was not. A recognizance, it is well settled, when taken before a magistrate and filed in a court of record, becomes a part of the record of the proceeding in that court, and may claim the dignity and verity which by law appertain to records. The plea in question therefore cannot avail the party.

The argument of inconvenience, arising from the number or the supposed character and qualifications of the magistracy having the power to take a recognizance, which has been addressed to us, might have some weight, it may be, if addressed to the legislative department. But impositions of the kind alluded to, can very seldom have occurred. And perhaps the inconvenience would be on the other side, if parties were permitted to yield to the strong temptation of extricating themselves from impending difficulty, by denying the verity of the recognizance, when the death or removal of the magistrate, or other circumstances might favor their success. Be that as it may, a recognizance filed becomes a record, and its verity cannot be questioned in the mode in this case attempted.

Let the judgment be affirmed.

CROCKETT *vs.* CROCKETT.

EVIDENCE. Subscribing witnesses. At common law, all the subscribing witnesses need not be called, unless it first appear that the instrument produced labors under doubt and suspicion, 1 Starkie's Ev. 320; 2 *Id.* 923, 6 Am. from 2 Lond. Ed.

SAME. Proof of will—*devisavit vel non*. The act of 1789, c 23, going upon the principle that the issue—*devisavit vel non*?—implies doubt and suspicion, requires the party in the first instance, to call all the living witnesses within the jurisdiction of the court; and that is the only change the act has made on the common law.

SAME. Handwriting. But if the witnesses reside out of the jurisdiction of the court, proof of their handwriting is admissible, as it is at common law, 1 Stark. Ev. 325; 2 Dev. & Bat. 311.

SAME. Practice. The fact that the witnesses do reside out of the jurisdiction of the court may be shown by any evidence tending to prove it. The production of a subpoena returned, "not to be found," is not necessary.

SAME. *Non est inventus*. The proposition in *McDonald vs. McDonald*, 5 Yerger, 307, recognized—That the proper officer's return on the subpoena for the witnesses, "not to be found," is sufficient evidence of their being out of the jurisdiction to let in handwriting. But if the return show that the witnesses are within the jurisdiction of the court, the secondary proof is inadmissible.

At November session of the county court of Sullivan, 1835, a paper purporting to be the last will and testament of Andrew Crockett was produced for probate by the executrix. It was contested, and an issue *devisavit vel non* was made up, and a transcript of the record and the original paper were certified into the circuit court of the county, for the trial of the issue there. On the trial at April term, 1838, before POWELL, Judge of the first circuit, and a jury of Sullivan, John Feathers, one of the subscribing witnesses testified, "that he was sent for on the 26th of July, 1830, to go to the house of the testator, and when he went, he found Thomas Cawood there; that Cawood had written the paper now in contest; that the testator signed it, and acknowledged it to be his last will and testament; and he and Cawood witnessed it in the presence of, and at the request of the testator; that the paper produced in evidence, in this cause, is the same which he and Cawood witnessed; that it was sealed up and given to him to keep; and that Thomas Cawood, in 1832 or 1833, removed to the state of Illinois."

His Honor instructed the jury that if they believed this testimony, it was sufficient to dispense with the production of

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Cawood, and that so far as this objection was concerned, they should establish the will. The jury found that the paper offered for probate was the last will and testament of the deceased; and a new trial having been refused, the caveators appealed in error.

The act of 1789, c 23, provides that in case a written will with witnesses be contested, it shall be proved by all the living witnesses, if to be found, and by such other persons as may be produced to its support.

ARNOLD, for the plaintiff in error, insisted that no evidence was admissible of the fact that a witness was not to be found, but a return to that effect upon process of subpœna; or proof of his death; or that he had been sought for in the place whither he was known to have removed, and could not be found. And that to render the latter proof competent, the return of *non est inventus* to a process issued within the State, at least to the place of his former residence, was indispensable.

T. A. R. NELSON, for the defendant in error, contended that evidence of the absence of the witness from the state, or of his being a citizen of another state, at the time the paper was offered for probate, is sufficient proof that the witness is not to be found, and would let in testimony of his handwriting. He cited 5 Yerger, 307, *McDonald vs. McDonald*; 2 Carolina Law Repository, *Wright vs. Wright*; and 1 Stark. Ev. 328.

June 11.

REESE, J. delivered the opinion of the court.

One of the attesting witnesses to the paper produced in this case for probate as a will, upon the issue of *devisavit vel non*, resided within the state of Illinois,—and the question is—whether the circuit court erred in receiving evidence of his handwriting? The act of 1789, c 23, requires that all the attesting witnesses, if living, shall be produced upon the trial of such issue, if to be found.

This court, in a case reported in 5 Yerger's Rep. 307,* decided that the return of a subpœna by the proper officer, "that the witness could not be found," was a sufficient com-

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pliance with the act of Assembly. This is to be understood as applying to a case, where the witness was not shown to be, or to have a residence in any other county within the state. We do not understand, that if, at the trial, it be established by proof, that the witness is resident in another state, or in a foreign country, and so without the jurisdiction of the court, the issuance of a subpoena and the return of an officer are necessary. The only change produced in the common law, by the act of 1789, c 23, is the requirement of all the living witnesses to be found within the jurisdiction of the court. When the attesting witnesses to a deed, will or other instrument, reside without the jurisdiction of the court in another state or foreign country, the secondary proof of handwriting is admissible. To transmit original documents from Maine to Louisiana, or from Tennessee to Calcutta, documents, in which, frequently others, besides the parties litigant, may be deeply interested, for the purpose of being proved by attesting witnesses, aside from the delay inconsistent with the speedy decision of causes, would so imperil the loss of the instruments themselves, that such a practice would not be tolerated. This is determined in the case of *Stump vs. Hughes*, 5 Haywood, 93, where the case in 1 Ten. Rep. 487, is expressly referred to and overruled. And this principle is sustained by the English courts and by almost all those of the United States. We feel satisfied that the judgment of the circuit court was correct.

Let the Judgment be affirmed.

1. NOTE. See numerous cases which have been decided upon the rule of the common law, requiring the production of subscribing witnesses to prove an instrument, and the exceptions to it collected and classed by Mr. Day in his note to *Oell vs. Dunning*, 5 Esp. C. 16, and 4 East, 53, and by Mr. Greenleaf, in a note to *Whitmore vs. Brooks*, 1 Greenleaf, 57; and by Mr. Johnson in a note to *Slaby vs. Champlain*, 4 John. Rep. 667. To which may be added, *Eaton vs. Campbell*, 7 Pick. 10, that it is unnecessary to produce a subscribing witness, when the proof of a deed is by an office copy; *Henry vs. Bishop*, 2 Wendell, 575, affirming the general rule and admitting the exception founded on the impossibility of producing the subscribing witness, and deciding that where there were witnesses who subscribed at the time of the execution, the testimony of one who subscribed afterwards cannot be received; *Lush vs. Drew*, 4 Wendell, admitting the exception founded on the death of subscribing witnesses, and their being beyond the jurisdiction; *Jackson vs. Chamberlain*, 8 Wendell, 620, that the absence of subscribing witnesses is sufficiently accounted for to let in proof of handwriting, by proof that one of them had removed from the State

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thirty years before the trial, and that the others had not been heard of for thirty-seven years; *Bell vs. Cowgell*, 1 Ashmead, 7, that where a subscribing witness becomes incompetent by becoming special bail for the defendant, his handwriting may be proved; *Jackson vs. Vail*, 3 Wendell, 125, that the contents of a lost deed may be proved by parol, but not if the party know who were the subscribing witnesses; *Jones vs. Corprileo*, 1 Blackford, 47, that if the attesting witness to a bond should reside in another state, it will be received in evidence on proof of their handwriting; and *Morgan vs. Morgan*, 23 Eng. Com. Law, R. 306, that where, after sufficient enquiry, an attesting witness cannot be found, his handwriting may be proved, though a letter, not disclosing his retreat, had been received from him a few days before the trial.

See also *Fox vs. Reil*, 3 J. R. 470, where, the distinction between special and simple contracts, as to this doctrine, is considered by Kent C. J.

2. The act of 1831, c 90, § 10, provides "that where all the subscribing witnesses to a deed, or other instrument are dead, or reside beyond the limits of this state, it may be proved by any two persons acquainted with the handwriting of the person who executed the same, which facts, together with the probate, shall be certified on said deed; and when all the subscribing witnesses are dead, except one, or all reside out of the state except one, said witness may prove the execution of the deed, provided, the handwriting of the other witness or witnesses, be proved by some other person."

3. In *Bethell vs. Moore*, 2 Dev. & Bat. 311, the supreme court of North Carolina decided that evidence of the handwriting of attesting witnesses to a will was admissible upon proof that they all resided beyond the limits of the state. They said that the expression "if to be found" is not to be construed literally. It admits of exceptions, where the witnesses are incompetent, or their attendance cannot be compelled. The reason in such cases is the same as if the witnesses were dead. The provision of the statute is but an adoption of the rule previously existing in England, upon the probate of a will upon an issue out of chancery, on which it is necessary to examine all of the witnesses, because the heir is considered as having a right to his ancestor's testable capacity and intention, from every one of those whom the statute calls around the testator, as guards against fraud on him, and imposition on those who would legally succeed to his estate. But several exceptions have been established. The insanity of one of the witnesses excuses the non-production of him, *Bernett vs. Taylor*, 9 Ves. 382. So if the witness be abroad, or otherwise not amenable to the jurisdiction of the court. *Carrington vs. Payne*, 5 Ves. 404, and *Wood vs. Slade*, 8 Price, 613, in 3 Eng. Exchq. R. 478; *Hampton vs. Garland*, 2 Haywood, 147; *Crowell vs. Kirk*, 3 Dev. R. 355. To these authorities cited by the court, add *Powell vs. Cleaver*, 2 Bro. C. C. 504; *Fitzherbert vs. Fitzherbert*, 4 Bro. C. C. 231, where, upon a bill to establish a will, infants being concerned, it was said by the Master of the Rolls there must be a commission to examine an absent witness.

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GAMING. *What it is.* Gaming is betting or wagering upon the event of any proposed course of action or contest, and then commencing and prosecuting the proposed course of action or contest in consequence of the bet or wager with a view to produce the event, and determine the bet or wager.

But an election is not commenced and prosecuted with any such view; therefore to bet on an election is not gaming.

SAME. *Power of grand jury.* Now the power of a grand jury to send for witnesses by the act of 1824, c 5, § 2, extends not beyond the case of gaming.

PRESENTMENT—INDICTMENT. It follows that a presentment for betting on an election, founded on the testimony of a witness sworn to testify of unlawful gaming, is void. And an indictment founded on such presentment cannot be preferred without a prosecutor marked thereon,—the act of 1817, c 61, § 4—only declaring that indictments for *gaming* may be preferred without a prosecutor being marked thereon.

The record shows that on Thursday, the 8th of August, 1837, the grand jury of Sullivan came into open court and demanded subpœnas for certain witnesses, among whom was David Shaver; that the subpœnas were ordered, issued, placed in the hands of the sheriff and returned executed on Shaver and others; that he and the others appeared in court were sworn and sent to the jury “to testify of their knowledge of *unlawful gaming* done in Sullivan county in the last six months;” that on the 11th of August, the grand jury came into open court with a bill of indictment against Daniel Smith, for *betting on an election*, endorsed a true bill, signed by their foreman and accompanied with a presentment on which said indictment was founded. The presentment concluded as follows—“Founded on the evidence of David Shaver, a witness sent for by the grand jury, and who was sworn in open court, and sent to the grand jury to testify as to his knowledge of unlawful gaming in Sullivan county.” Upon the indictment was endorsed the following—“Founded on a presentment of the grand jury at August term of the circuit court, 1837. A true bill. R. Netherland, foreman of the grand jury.” But no prosecutor was marked on the indictment.

At December term, 1837, the defendant appeared and pleaded in proper person, that the presentment upon which said indictment is founded, was made by the grand jury not

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upon their own knowledge, or that of any of their body, but upon the information, as said presentment recites, of David Shaver, a witness sent for by the grand jury, and this, &c.; wherefore he prayed judgment of the said indictment, and that the same be quashed." To this plea the attorney general, BRABSON, demurred.

On argument of the demurrer before his Honor Judge POWELL, he overruled it, and discharged the defendant,—from which judgment the attorney general appealed in error.

June 11. GREEN, J. delivered the opinion of the court,

Upon this indictment for betting on an election, no prosecutor was marked. It was founded upon a presentment, made upon the evidence of Peter Shaver, a witness sent for by the grand jury, and sworn in court, and sent to them to testify of unlawful gaming.

The defendant pleaded in abatement that the presentment was not found upon the knowledge of the grand jury,—but upon the information of a witness not of their body, sworn and sent to them. To this plea the attorney general demurred, but the court overruled the demurrer, and ordered that the defendant be discharged. From this judgment the attorney general appealed to this court.

By the act of 1824, c 5, § 2, grand juries are authorised to send for witnesses to give evidence of unlawful gaming, and such witnesses are required to give evidence of any offence that may be known to them, against the statutes to suppress gaming.

By the act of 1823, c 25, § 2, betting on an election is declared to be a misdemeanor, and the persons guilty thereof are subject to punishment as in cases of betting on any games of hazard by the laws then in force.

The first question is, were the grand jury authorised to send for witnesses to give evidence against persons for betting on an election? The power of the grand jury to send for witnesses, is created by the act of 1824, above referred to, and is not made to extend beyond the case of gaming. If, then, betting on an election be not gaming, they were not

authorised to send for the witness Shaver, or to find a presentment upon his evidence.

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Any contest, or course of action commenced and prosecuted in consequence of a bet or wager, and with a view to determine the bet or wager, upon the event of such contest or course of action, is gaming. Thus, in 1 Wilson's Rep. part 2, p. 309, it is decided, that horse racing is gaming within the Statute of Anne, being within the words "other game or games. So also (same book, part 2, folio 36) in the case of *Lynall vs. Longbothom*, it is held, that a foot race against time is a game within the statute. But in that case it did not appear that Clark, the man who was alledged to have run against time, knew of the bet, or participated in it, or was running against time. "Clark might," say the judges, "run for his diversion," in which case he could not be said to play at the game called foot-race, and a bet upon his running would not be within the statutes against gaming.

These cases make it very clear, that to constitute gaming, there must not only be a betting upon the determination of an event, but the course of action to bring about such event, must have been originated and commenced with a view to determine the bet.

This is not the case in elections, and therefore a bet upon an election is not gaming within our statute.

It is probable that if two persons were to become candidates in consequence of a bet, the one would get more votes than the other. This would, within the authorities, constitute it a game, and then all other bets upon that election would be gaming. But that was not the case here. The contest which was determined by the election upon which this bet was made, had no reference to the bet, nor does it appear the candidates knew it was pending.

In this view of the case, we are of opinion the grand jury had no right to send for the witness, nor, after he was before them, to find this presentment on his evidence. By the act of 1817, c 61, § 4, it is declared that indictments for gaming may be preferred without a prosecutor being marked thereon. But this act does not authorise this indictment to

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be so prosecuted, because it has been shown that it was not an indictment for gaming.

As therefore this is not an indictment for gaming, and as the presentment is void, it is indispensable that a prosecutor should have been marked upon the indictment, and this not having been done, the demurrer to the plea of the defendant was properly overruled.

Affirm the judgment.

HORN vs. CHILDRESS.

ENTRY. *Notice to occupant—waiver of notice—estoppel.* If, without the notice required by the act of 1824, c 22, § 6, an entry be made, including, in part, land occupied and cultivated by another, the entry and grant thereupon obtained are void *pro tanto*. And, if the occupant, after the making of such entry, agree that it may be surveyed, on condition that the enterer, after obtaining a grant, convey to him, the land cultivated by him, he does not, thereby, waive the notice, nor is he estopped to insist that the entry and grant are void.

SAME. *What is a waiver.* This case distinguished from *Wilson vs. Hudson*, 8 Yer. 398, where the occupant was present when the entry was made, and consented thereto. On the point of the partial invalidity of the entry and grant, *Den vs. Nixon*, 10 Yer. 518, recognised. And see *Danforth vs. Wear*, 5 Cond. R. 722; 2 Peters, 236.

In 1782, North Carolina granted to Thomas Ramsay 500 acres of land, and in 1791, to Valentine Pope, 300 acres, in Sullivan county, which tracts were supposed, for a long time, to be bounded, on one side, by a common line. Childress, thinking that he had discovered a parcel of land lying between them, not covered by either, made an entry of twenty-two acres of it, on the 4th of March, 1826, as vacant and unappropriated. When he came to survey his entry, on the 3d of August, 1826, he found part of it in the occupation of one Moody, who claimed in right of his wife, sole heiress of the grantee Pope, and as purchaser of the tract granted to Ramsey. The surveyor refused to run through Moody's close without his consent, to obtain which Childress promised, that when he should procure his grant, he would convey to him whatever part of his enclosure it

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might embrace. Moody thereupon permitted the survey to proceed and be completed. In 1829, Moody and his wife conveyed to one Gains one hundred acres, part of the tract granted to Pope, including some portion of Childress' entry; and in the same year, they conveyed fifteen acres and a quarter, part of the tract granted to Ramsey, and including also another portion of the entry of Childress. Horn took possession of the parcel conveyed to him; and Childress, having procured a grant for the twenty-two acres, dated September 16, 1833, commenced this ejectment, on the 20th May, 1834, against Horn's tenant. The action was tried at August term, 1837, before Judge SCOTT, of the 2d, sitting for Judge POWELL, of the 1st circuit, and a jury of Sullivan.

The counsel for Horn requested the court to charge the jury, that the lessor of the plaintiff could not recover because his entry and grant for the twenty-two acres were void for want of thirty days notice to the occupant, as required by the act of 1824, c 22, § 6. His Honor refused so to charge, but instructed the jury, that if notice were required, it need not be expressly proved, but might be inferred, nor was it necessary, that it should be written notice; and furthermore, that notice might be waved, and if Moody suffered the lessor of the plaintiff to run through his fields, it was a waiver of the notice required.

The jury found for the plaintiff, and the defendant's motion for a new trial having been overruled, he appealed in error.

GREEN J. delivered the opinion of the court.

In this case, Horn, who was defendant below, claims the land under Moody, from whom he purchased. Moody was in possession of, and cultivated, a small part of the land included in Childress' entry and grant, at the time Childress' entry was made, and no notice was given to him, by Childress, of his intention to enter the same, as is required by the act of 1824, c 22, § 6. After the entry of Childress had been made, and when it was being surveyed, the surveyor refused to run through the part in the occupation of Moody, unless with Moody's consent. Childress then applied to Moody for permission to run through his field, promising that

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when he should get his grant, he would convey the field back to Moody, on his paying his proportion of the fees. Upon this condition, Moody permitted him to run through the field. The conveyance was not made as promised.

The defendant insisted, that, as no notice had been given as directed, by the act of 1824, c 22, § 6, the entry and grant of the lessor of the plaintiff were void. But the court charged the jury—"That notice need not be expressly proved, but might be inferred, nor was it necessary that it should be written notice; and furthermore, that notice might be waved, and if Moody suffered the plaintiff to run through the field, it was a waiver of the notice required."

It is true, as his Honor stated to the jury, that the notice, required by the statute, may be waved. So this court held, in the case of *Wilson vs. Hudson*, 8 Yer. 408, where it is decided, that if a party, who is in the possession and cultivation of land, advise another to enter it, and is present when the entry is made, consenting that it should be done, he shall be held to have waved his right to the thirty days notice, required by the act of 1824. But, in the present case, there was no assent, given by Moody, that Childress should make the entry, nor does it appear he knew any thing of the claim of Childress, until the survey was being made. It is, therefore, not within the principle of the case of *Wilson vs. Hudson*.

The agreement of Moody, after the entry had been made, that the surveyor might run through his field, cannot be regarded as a waiver of the notice, that should have been given him long before that time. This agreement had, in fact, no reference to the previous action of Childress, but was made upon his promise to convey the land, included in the field, to Moody, when he should get a grant; and the question is, whether Moody is estopped, by this agreement, to insist that the entry and grant of Childress are void for want of the notice? We think he is not. The agreement would have been, in effect, a verbal sale of his land, or his occupant right to it, if Childress had contracted to retain the title in himself and make compensation to Moody, and would have been within the statute of frauds, as in the case of *Nichol vs.*

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Lytle, 4 Yer. 456. But he did not consent to part with the land. He only agreed, that the title might pass into Childress, to be revested in himself. If this agreement does not bind Childress to convey the land to Moody, according to his promise, surely it would be the greatest injustice, to say that it should estop Moody to insist, that the entry and grant are void for want of the notice. Although, therefore, the entry and grant of Childress are void, by the express provisions of the statute, yet, as this court decided in *Den vs. Nixon*, 10 Yer. 518, the last term at Nashville, it is void *pro tanto* only. It is valid, except as to the land which was unlawfully included.

The judgment must be reversed, and the cause remanded for another trial, to be had therein.

NOTE. *Acquiescence—waiver*. It is frequently said, in the books, that rights are lost by acquiescence and waiver. A brief essay upon this point, methodising what is to be found in the authorities, would be an acceptable present to the profession.—For the present, see the doctrine relative to this subject, stated in 2 Merivale, 335, 336, by Sir John Leach in argument, and 326, by Sir William Grant. The circumstances of acquiescence may justify the inference of an express agreement, or may amount to a *waiver*. But they can have neither of these effects where the party was ignorant of his rights, or was laboring under a mistake. See BROWN'S Notes, Book A. 56, M M.

BEETS *vs.* THE STATE.

HOMICIDE. Degrees of guilt. If a party be engaged in an unlawful act, and another, though without concert, assist him, and actually perpetrate the mischief, the first party is responsible for whatever result he himself intended, as though he had been the sole perpetrator.

SAME. Abettor. And the degree of the abettor's guilt will depend on the intent with which he acted.

SAME. Authorities—Distinctions. The rules as to the different degrees of homicide of which several persons, present at the act, may be guilty, stated in 1 Russell, 398, Am. Ed., 1 Hale c 34—the three last paragraphs—1 Hawk. c 31, § 35, and the distinctions taken in the latter book from § 40 to § 50 inclusive, recognized.

EVIDENCE. Dying declarations. It is error to admit as evidence to the jury a copy of dying declarations, taken down, in writing, by the examining magistrate, though such declarations would have been evidence, had they been sworn to by the magistrate.

SAME. Same—secondary. The written statement, taken by the magistrate would be admissible, as secondary evidence, if the magistrate swear that he cannot recollect the statement of the deceased. The rule stated in Peck's Rep. 118, approved.

The grand jury, at May term, 1838, of the circuit court of Grainger, indicted James Beets, George Beets and David Reed of murder in the first degree, committed upon the body of Samuel Rayle, on the 20th of January, 1838.—Two of the defendants, Joseph and George Beets, pleaded not guilty and were put upon trial on the 18th and 19th of May, 1838, before ANDERSON, Judge of the 12th circuit and a jury of Grainger. The Attorney General GARRETT, on the trial, offered in evidence a copy of a statement made by the deceased in view of death, reduced to writing by the justice of the peace before whom the defendants were examined, sworn to, but not signed by the deceased. It was produced by the justice, objected to by the defendants' counsel, but admitted by the court, and was as follows—“*State vs. James Beets and others.* Testimony of Samuel Rayle. Saith George Beets pushed or shoved him the said Rayle twice or three times, when George had him down on his back. Joseph Beets asked the said Rayle if he saw him strike him? Said Rayle answered he did. Sworn to before me the 21st of January, 1838. John Ivy, Justice of the Peace.” The circumstances of the killing, the charge of the circuit court and verdict are stated in the opinion of the court.

GREEN, J. delivered the opinion of the court.

This is an indictment against the plaintiffs in error for the murder of Samuel Rayle. It appears that all the parties were at a still house drinking, and James Beets and Rayle had angry words and were about to engage in a fight. George Beets, one of the plaintiffs in error, then came up and interfered to prevent the fight, declaring that they should not fight, but that if fighting was to be done, he would do it, whereupon Rayle struck him a blow, and a fight between them ensued, during which George Beets threw Rayle to the ground. Joseph Beets stood by and encouraged George in the fight, and while it was progressing, James Beets returned to where the parties were engaged and shot Rayle with a pistol, of which he died.

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The justice of the peace before whom the parties were examined, took down in writing, the statement of the deceased, which was made in view of death, and sworn to by him,—a copy of which statement he produced on the trial of the cause. The defendants objected to the reading of said paper as evidence against them, but the objection was overruled by the court; and the paper was read to the jury.

The court charged the jury, that if George Beets engaged in the fight in self defence, and while thus fighting, James Beets shot Rayle without the knowledge or consent of George, George would be guilty of no offence. But if George Beets fought willingly, so that he would be guilty of an affray, and while thus fighting, if James Beets shot Rayle, it would be manslaughter in George, although James shot without the knowledge or consent of George. The jury found the defendants George and James Beets guilty of manslaughter. The defendants moved for a new trial, which was overruled by the court, and judgment pronounced against them,—from which judgment this appeal in error is prosecuted.

The first question is—whether the charge of the court is erroneous? It is certain that if George Beets, in the fight, had himself killed Rayle, it would be manslaughter. He was not fighting in self defence, but was engaged willingly in the combat. The fact that Rayle gave the first blow does not effect the question otherwise than to constitute a great prov-

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ocation, which will reduce the killing to manslaughter, Archbold, bottom page, 324. It is laid down in the same book, and also in 1 Hawk. c 31, § 35, 56, that if when two are fighting, a third come up and take the part of one of them,* and kill the other, this will be manslaughter in the third party, and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel, 1 Russell on Crimes, 398; 1 Hale, 446.

The principle is this, if a party be engaged in an unlawful act, and another assist him, and actually perpetrate the mischief, the first party shall be held responsible as though he had been the sole perpetrator himself. If a man is fighting with another not intending to kill, but by some unlucky blow death ensues, he is guilty of manslaughter, and why is this? Not because he intended to inflict death, but because he was engaged in an unlawful act, and the blow and the death were consequences of that act, and he must be responsible for it as though he had designed the result. Upon the same principle it is, that he is responsible to the same extent, though the fatal blow be struck by another, who assisted him without any concert on his part.

The assistance is given because he is engaged in the unlawful act; and, as he unlawfully creates the occasion for the interference and assistance of the third party, he must answer for the consequences, as though he had been the sole actor. We are therefore of opinion that there is no error in the charge of the court below.

The next enquiry is—was the copy of the statement of Rayle, as taken down by the justice of the peace, proper evidence in this cause? This statement was made in view of death, and would unquestionably have been competent evidence, if the facts so stated by the deceased, had been proven by the witness, *Johnston vs. State*, 2 Yerger's Rep. 58; *McPherson vs. State*, 9 Yerger's Rep. 279.

But this was not done,—the witness does not swear that Rayle stated the facts contained in the paper. He says he

*"His principle motive being to assist him," Hawkins, B. 1, c 31, § 49, 50.

[REPORTED.]

took down Rayle's statement, and that the paper he produced was a copy from the original. It was this paper, thus proved, that was made evidence and was read to the jury. This does not come within the principle of the case of *Rogers vs. Burton*, Peck's Reports, 103, in which the court says—"with respect to Judge Scott's testimony, I take the rule to be that a witness may refresh his memory by reading his notes; if, after reading them, he can recollect the facts they detail; but if, after reading them, he cannot recollect the facts, then he ought to produce the notes themselves,—that was done in the present case, and it was sworn, by Judge Scott, that the notes were correctly taken, I am of opinion that the evidence was proper."

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In the case before the court, Ivy, the witness, does not state whether he recollects what Rayle stated or not; and as the written statement, according to the case relied on by the Attorney General, could only be used as secondary evidence, in case the witness could not recollect the facts; his non-recollection of them must appear, as a ground to let in the paper which was offered. We think the court erred in permitting the paper to be read to the jury.

Reverse the Judgment and remand the cause for another trial.

THE STATE vs. ELKINS.

CRIMINAL LAW. *Indictment, finding of:* "True Bill" endorsed on a bill of indictment, and signed by the foreman of the grand jury, is a sufficient memorandum of the finding, and is as good as—"A true bill."

Seem, that the word "TRUE" endorsed on the bill and effectually signed, would be a sufficient memorandum of the finding, and the words, "*not true*," of the rejection of a bill.

Several equivalent expressions enumerated by the court.

The defendant was indicted at February term, 1838, of the circuit court of Knox, of larceny in stealing bank notes. The notes were described as "two bank notes on the Planters' Bank of Tennessee, of twenty dollars each, one three dollar bill on Yeatman, Woods, & Co., two two dollar bank

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notes on the Bank of the State of South Carolina, one bank note of two dollars on the Union Bank of the State of Tennessee, all of the value of forty-nine dollars." The signature of the attorney general to the bill of indictment was,— "Reuben B. Rogers, Atto. Gen'l." The finding of the bill by the grand jury was noted by the following endorsement—"True Bill. Benjamin McNutt, foreman of the Grand Jury."

The defendant appeared, pleaded not guilty, at the same term, and was put upon trial before his Honor Judge SCOTT of the second circuit, and a jury of Knox, and found guilty. He moved in arrest of judgment and assigned the following reasons. 1—The description of the property stolen is vague and uncertain. 2—The indictment charges that the felony was committed of certain bank notes of Tennessee banks, North Carolina banks, and South Carolina banks, and does not aver that such banks exist. 3—The indorsement of a true bill on the indictment is not made by the foreman of the grand jury, Benjamin McNutt, but Benjamin McNutt. 4—The bill of indictment is not signed by the attorney general of this judicial circuit—nor does the signature show of what solicitorial district the attorney general is: and for these and other reasons to be shown in argument, he prayed that the judgment be arrested.

His Honor gave the following judgment—"It is considered by the court that the reasons in arrest of judgment be sustained,—it appearing that no sufficient finding by the grand jury is made on the indictment." The attorney general appealed in error.

GEORGE S. YERGER, attorney general for the State.

SWAN and ALEXANDER, for the defendant, insisted that by the omission of the article "a" in the finding of the jury, the accusation was incomplete, and cited 1 Chitty's Criminal Law, 324; 4 Bl. Comm. 305, 306: and that no writ of error could be prosecuted in this case, because there is no final judgment, either punishing or discharging the defendant, so as to terminate the cause in the court appealed from.

REESE, J. delivered the opinion of the court.

June 14. The defendant, who is charged with larceny in stealing cer-

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tain bank notes, having been found guilty by the verdict of the jury, moved in arrest of judgment, and assigned various reasons, as that the bank notes are not well described; that the existence of the bank is not sufficiently alledged; that the official signature of the attorney general to the indictment does not name the district for which he is attorney, and that the indorsement of the finding of the bill of indictment, by the foreman of the grand jury, is not sufficient.

As his Honor, the circuit judge, very properly as we suppose, thought the first, second and fourth reasons not well taken, we shall confine our consideration to the third, which the circuit court thought of sufficient importance to arrest the judgment.

The only difference from the usual finding, consists in the omission of the indefinite article, "a," before the words "true bill." The indorsement is, "true bill," instead of "a true bill."

We deem it wise and prudent, because safe, in all concerns in the administration of justice, to adopt those words and forms of expression, which long and well established usage may have prescribed. But we do not suppose that the omission of the article "a" changes the meaning of the indorsement, or the character of the finding. Either mode of expression is highly elliptical, and is intelligible only because of its relation to the paper upon which it is written.

They alike by the place where put and by conventional use, import that "we, the grand jury, find that the within bill of indictment is true."

If the words just quoted were used, although differing from the common form, would any one doubt that the return would be good? So of any of these, "This is a true bill of indictment," "This is a true bill," "a true bill of indictment," "a true bill," "true bill,"—who shall say that but one of these is good, or that all of these modes of expression but the last are good, when that last, from its relation to the indictment on which it is written, and from its intrinsic meaning, although the most simple and elliptical, is as intelligible as any, and conforms most nearly to the severe simplicity and brevity of the latin original.

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One word, *ignoramus*, by being placed upon the bill, was deemed sufficiently explicit, when a bill was returned as not true. We are not prepared to say that the single emphatic word, "true," indorsed upon a bill, and officially signed, would not sufficiently find it, and the words, "not true," reject it.

We think therefore that the judgment was erroneously arrested, and we reverse the decision, and give judgment for the state.

THE STATE vs. MUZINGO.

CRIMINAL LAW. *Presentment how a part of the record.* A presentment becomes a part of the record of the court by being returned into court by the jury and filed by the clerk, without any memorandum upon the minutes of the court of these facts. Ante *Barkley vs. The State*.

SAME. *Same.* Indictment and presentment distinguished in this respect. Ante, *Blevins vs. The State*, note.

The grand jury of Campbell, at June term of the circuit court, 1837, presented the defendant for an affray. The presentment was signed by all of the jury, but the fact of its being made was not noticed on the record. The defendant appeared at February term, 1836, and pleaded not guilty, and being put upon trial was found guilty. He moved in arrest of judgment, that "the record does not show that the grand jury returned into court a presentment against the defendant." His Honor Judge Scott arrested the judgment, and the attorney general ROGERS appealed in error.

GEO. S. YERGER, attorney general, for the state.

DUDLEY, for the defendant.

June 14. GREEN, J. delivered the opinion of the court.

In this case the defendant was prosecuted for making an affray. There was no entry made on the minutes of the court that the grand jury returned said presentment into open court, but the presentment, having been filed with the clerk, signed by all the grand jurors, the defendant was put upon his trial and found guilty by the jury.

A motion was made in arrest of judgment, because it did not appear, by the record, that the presentment had been returned into court. And the judgment was arrested. The attorney general on behalf of the state appealed to this court. Muzingo.
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We are of opinion this judgment was improperly arrested. The principle in the case of *Chappel vs The State*, 8 Yer. 170, has very little application to the case of a presentment. An indictment is only signed by the foreman of the grand jury, and therefore, unless it appears from the record, that the bill was returned by the jury into open court, "a true bill," it cannot appear that it has been before them, and found by them. Not so in the case of a presentment. That is signed by all the jurors, and we have thus an assurance that they have acted on it and found the facts it presents. An entry on the record, that they had found the presentment, would be no more satisfactory of the existence of that fact than their signatures to the paper. We therefore think the court erred in arresting this judgment, and order that its judgment be reversed.

And this court proceeding to give such judgment as the circuit court should have given, order and adjudge that the defendant be fined five dollars, and pay the costs of the prosecution, and of the appeal to this court.

JACOB vs. SHARP.

FREEDOM. Bequest of. A bequest of freedom is not to be defeated by any right of disposition, not exercised, which may be given to a legatee for life of the slave's services.

SAME. Ambiguity in bequest of. If there be in a will a bequest of a present right of future freedom, to be enjoyed after the determination of a life estate in the slave's services coupled with a contingent power of disposal in the legatee of the services, and there be doubt as to the meaning of those clauses, the power of disposition must be construed to be subordinate to the higher and more important right of freedom.

SAME. Limitation of, with power of disposal. A bequest of slaves to a wife to keep them if obedient to her, and at her death "to be set free," but if disobedient, to dispose of them at pleasure, construed to vest the slaves with a present right of future freedom, defeasible by the exercise of the wife's contingent right of disposal. Marriage is not an exercise of that right.

On the 8th of January, 1825, Abraham Vernon of Hawkins, who appears to have been childless, made and published his last will and testament, of which he appointed Rebecca, his wife, sole executrix. After providing for the payment of his debts and of two small money legacies to his brothers, he gave all the residue of his estate to his wife; and then the will concluded with the following clause. "And my negroes, Jacob and Jinne, and her two children, Jack and Malinda, I wish her (his wife) to keep them, if they are obedient to her, and at my wife's death, I wish them to be set free: and if they should be disobedient to my wife, she may dispose of them as she pleases."

He died on the 14th of the same month; and on the 4th of October, 1826, his wife, who was about sixty years of age, intermarried with William Sharp, the appellant, who was of the age of 18 or 19 years.

She died in May, 1834, without making any disposition of the slaves.

After her death, Sharp took Jinne and Jack, Malinda having previously died, to Mississippi, where he sold them as slaves. Threatening to do the same with Jacob, he took refuge in the house of John A. McKinney, Esq. to whose protection his mistress, a few hours before her death, had commended him, and by his next friend, Hasten Vernon, a brother of the testator, on the 29th of November, 1834, filed this bill, stating the devise above recited, and Sharp's

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threats to sell him, and praying for an injunction to prohibit Sharp from disturbing him in his then place of residence, and from removing or attempting to remove him beyond the jurisdiction of the court till application could be made to a court of law to emancipate complainant according to the will, or until the merits of the cause could be heard and determined in the chancery court, and for general relief. The injunction was granted.

On the 30th of March, 1835, Sharp filed his answer, in which he put his defence, first upon the position, that the devise vested the testator's wife with an absolute estate in the slaves, which estate was devolved, by the marriage, upon the appellant; but if not, and the rights of the slaves to freedom depended upon their good behavior, then it had been forfeited by numerous acts of disobedience, misconduct and crime, on their part, and especially, on part of Jacob, and the answer proceeded to enumerate several of these acts. A replication was filed, and the cause was at issue.

Upon the latter ground of defence, testimony was taken *pro and con*; and it showed that, in the testator's life time, Jacob had been obedient and dutiful; that afterwards, he had fallen into habits of intemperate drinking, and at such times, had been insolent and disobedient to his mistress, and had, on one occasion, even threatened her life; and that he had been taken before magistrates on an accusation of stealing, been pronounced guilty and punished; that he had not been obedient to appellant after his intermarriage with his mistress; but that since his residence with Mr. McKinney, he had conducted himself with propriety.

On the hearing, at September term, 1837, before Chancellor BRAMLITT of the Middle Division, his Honor declared the complainant to be entitled, under the will, to all the rights and privileges of a free man, on his giving bond and security to leave the State, within a period not exceeding six months, according to the provisions of the acts of Assembly in such case made and provided; and he perpetuated the injunction.

J. A. MCKINNEY for complainant*.

PERK, for the defendant, insisted that by the words of the

*No memoranda came to my hands of Mr. MCKINNEY's argument.

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will, the widow took the whole interest in the slaves, and cited *Irwin vs. Farrer*, 2 Supp. to Ves. 437; that she had a right of disposition, which she had exercised by the marriage with the defendant, and if there was a remainder in the right to freedom, as supposed in *Pleasants vs. Pleasants*, 2 Call's R. 270, it was cut off by the power of disposition vested in the wife, Reeve's Domestic Rel. 1, *et seq.*; that if a trust could be supposed, its exercise was discretionary, and this was a case where the discretion could not be controlled, *Pigot vs. Bullock*, 1 Supp. to Ves. 137; *Kemp vs. Kemp*, *Id.* 439; finally, that if the negro had a right to freedom by the will, still it was a contingent right, and whether it could ever become absolute depended upon himself, and he had defeated and lost it by his own acts. 2 Supp. to Ves. 162, note to *Dashwood vs. Lord Bulkeley*, 5.

GREEN, J. delivered the opinion of the court.

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Jacob was the property of Abraham Vernon, who in 1825 made his last will and testament, and shortly afterwards died. After devising some pecuniary legacies, the will proceeds, "and the residue to be at the disposal of my wife, as she wishes; and my negroes, named Jacob, Jinne and her two children, Jack and Malinda, I wish her to keep them if they are obedient to her, and at my wife's death, I wish them to be set free, and if they should be disobedient to my wife, she may dispose of them as she pleases." After the death of Vernon, his widow married the defendant,—since which time *she* has died. The defendant being about to take Jacob to the South, and sell him as a slave, this bill is filed by Jacob, to restrain defendant, and to obtain his freedom.

1. The first question is upon the construction of the will. It is earnestly contended by the counsel for the defendant, that the right of disposition conferred upon Mrs. Vernon, by the will vested in her the absolute title to the slaves, and is wholly inconsistent with their right to freedom after her death. On the other hand it is insisted by the counsel for Jacob, that the true meaning of the phrase in the will that "she may dispose of them as she pleases," does not author-

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ize the exercise of an absolute right to them, or impair their title to liberty.

It is unnecessary to determine which side is right in the construction contended for, inasmuch as this court has determined in the case of *Lavina vs. Duffield's Executors*,*

*John Duffield, of Davidson county, made his last will and testament, on the 6th of March, 1807, in which, after providing for the payment of his debts, there was the following disposition relative to the residue. "All to belong and be at my loving wife, Elizabeth Duffield's disposal and command, during her life time; and at her death, all the negroes of mine to be emancipated agreeable to the following directions, which are,—all my male negro slaves are to be free at 22 years of age, and the females at 19 years of age." He died in June, 1812, and his wife in 1832. The executors of his will neither qualified nor acted in the administration. On the 6th of August, 1836, Lavina, who was one of Duffield's slaves at the date of the will and at his death, filed her bill, in which Jackson, her son joined, in the chancery court at Pulaski, against the surviving executors of her master's will and John Goff, who held them in slavery, praying the court to decree them their freedom, and for general relief. The bill was dismissed as to one of the persons sued as executor, by consent. The other answered and disclaimed, never having qualified or acted as executor. Goff answered, admitting that he had held the complainants as slaves for eight or nine years, "as he had a right to do," without stating the grounds of said right, and denying that Lavina was one of the negroes owned by Duffield at the date of his will, and thence up to his death, and that she was one who was intended by him to be emancipated. This denial was made upon information which respondent believed to be true, but he did not state who gave him the information, or what facts it consisted of.

The proof is that Lavina had been in Duffield's possession before and at his death, at least; and according to the belief of the witness, had been born on his plantation, and positively that she was raised by him, but whether she was his property or his wife's the witness could not declare.

At September term, 1837, Chancellor WILLIAMS dismissed the bill. The complainants appealed; and on the hearing, on the 3rd of March, 1838, the court pronounced a decree establishing their freedom. After stating the material facts in the case, the opinion of the court, which was delivered by Judge TURLEY, proceeds:—

"It is admitted that the right of the complainants to be emancipated depends upon the construction of the will of Duffield. The defendants insist, that an absolute title to the negroes was invested in Elizabeth Duffield by its provisions. But the court cannot give it such a construction. It is obvious that the intention of the testator was only to give a life estate to his widow; and the words used do not give it a greater. The devise is comprised in one sentence, viz:—'to belong to, and be at my loving wife, Elizabeth Duffield's disposal and command during her life time, and at her death, all the negroes of mine to be emancipated.' Exposition cannot make this provision plainer. There is no pretence for saying that more than a life estate in the negroes was given to Elizabeth Duffield. This court is, therefore, of opinion, that the complainants are entitled to their freedom; and order that they be emancipated, upon their giving bond and security to indemnify the county of Davidson—the place of John Duffield's residence at the time of his death—according to the existing laws on the subject."

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that the principle contended for by the counsel of the defendant, does not apply to the case of a devise of freedom. The liberty which a testator intends to bestow, is of so high a value to the objects of his benevolence,—and must be supposed so to occupy his thoughts, and so strongly to fix his purposes, that a devise of freedom is not to be defeated by any right of disposition (not exercised) which may be given to a devisee for life;—and if there be any doubt of the meaning of the will, the power of disposition, must be construed to be subordinate, to the higher, and more important right of freedom.

But in this will, no absolute power of disposition is given. The testator says, “if they should be disobedient to my wife, she may dispose of them as she pleases.” Here the right of disposition, depends upon a contingency which may never happen, and of course, she could acquire no absolute right to them, until they become disobedient,—and in the exercise of her power she should actually dispose of them. It will not do to say, they were disobedient, and therefore an absolute right to them vested in her. The will only confers the right to dispose of them, on the happening of the contingency mentioned. She is left free to determine what conduct on their part should constitute a “disobedience,” that would justify her in selling them. The testator did not contemplate that the slightest disobedience should constitute the right of disposition, for he knew that perfect obedience, had never been attained by mortal man. And, therefore, proof of Jacob’s disobedience could have no effect on conferring on Mrs. Vernon an absolute title to him, unless she had acted upon it, and executed the power conferred on her by the will, by actually disposing of him.

2. It is next contended that Mrs. Vernon did actually dispose of Jacob by her marriage with the defendant. It is true she conferred on the defendant, by that act, all the title to Jacob which she herself had—which was an estate for life. But it is not easy to comprehend, how Sharp, by the marriage, acquired a greater estate in Jacob, than his wife possessed before the marriage,—or how the marriage could enlarge Mrs. Vernon’s rights under the will.

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3. It is next insisted that Jacob's right to freedom depended upon a condition precedent,—(his good behavior) with which condition he has not complied, and therefore the right does not exist. This position is taken, because of inattention to the terms of the will. It will be perceived upon inspection of the will, that the right to freedom is absolutely conferred,—but the power to *defeat* that right, is given Mrs. Vernon, on the happening of a contingency. The principle here insisted on, has no application to this case.

4. It is next insisted, that Jacob's character is too bad to justify this court in consenting on the part of the State, that he should be free. We do not think the proof is such as to authorize us to say that Jacob is unfit for the freedom this will confer on him,—more especially as he is to leave the State.

Affirm the decree.

JONES vs. THE STATE.

WITNESS. *Competency of persons of mixed blood.* Under the act of 1794, c. 1, § 32, declaring all persons of mixed blood, descended from negro and indian ancestors to the third generation inclusive, whether bond or free, to be incapable in law to be witnesses in any case whatever, except against each other, no person thus disqualified can be a witness, in a state prosecution, for a defendant, who belongs to one of the disqualified classes.

At October term, 1836, of Roane circuit court, the grand jury indicted the plaintiff in error, a free man of color, of petit larceny. The chattel—a meal bag—charged to have been stolen, was found in his possession, and on being accused of the theft, he said it had been given to him by Peter, a free man of color, who lived near Kingston, and to whom he had taken meal. To show the probability of this account, on the trial before his Honor Judge KEITH, of the 3d circuit, at June term, 1837, the plaintiff in error proved by Thomas Brown that he had, in the summer of 1836, dealt in meal in Kingston, that Peter then lived near Kingston, and traded in meal, beer, cakes, &c., and that Peter's house was on the direct rout from Kingston to the residence of plaintiff in error. He did not offer to introduce Peter as a witness; and in order to prevent the jury from drawing from the omission an inference of guilt, his counsel requested his Honor to charge them, that Peter was not in law a competent witness; that the circumstances proved by Brown were admissible, and were the best evidence the nature of the case would admit of, to account for the manner of his coming into possession of the bag. His Honor refused so to charge the jury, but instructed them, that Peter, the free man of color, or even a slave, was a competent witness in law for the defendant, and that he should, therefore, have produced him, as well as proved the circumstances stated by Brown.

The jury returned a verdict of guilty, and a new trial being refused, and judgment pronounced, the defendant appealed in error.

RESE, J. delivered the opinion of the court.

June 15.

The plaintiff in error is a free man of color. The pro-

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perty charged to have been stolen, was found in his possession and at the time it was so found he alleged that he had gotten it from Peter, a man of color. The case was one in which the alleged guilt of the prisoner depended upon circumstantial testimony, and on the part of the prisoner, certain circumstances were proved by Thomas Brown to make the truth of the statement that he had gotten the property from the slave, Peter, probable.

The defendant's counsel before the jury insisted, that Peter, a free man of color or slave, was an incompetent witness for the defendant, and therefore the circumstances, as proved by the witness Brown, were admissible and the best evidence the nature of the case admitted, to prove how defendant came into the possession of the property; and asked the court so to charge the jury.

The court refused so to charge, but charged that Peter, the free man of color or a slave, could be examined, and was a competent witness in law for the defendant, and should have been produced, as also the circumstances proved by Brown, the witness. The only question in this case is,—whether this opinion of the court is correct?

The act of 1794, c 1, § 32, declares that all negroes, indians, mullattoes and all persons of mixed blood, descended from negro or indian ancestors to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, should be held and deemed to be incapable in law to be a witness in any case whatever, except *against* each other. Here the disqualification is general and absolute, and the exception limited to a single and distinct case. These persons, says the act, except against each other, cannot be witnesses. The court said, that the man of color could be a witness *for* the defendant and against the state. This opinion is not authorised by the act of assembly.

The cases, under this act, in which these disqualified persons can be witnesses for each other, are when plaintiff and defendant both being men of color, the witnesses may at the same time be said to be reciprocally witnesses against each of the parties. Perhaps the practice in Tennessee may

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have been heretofore much more liberal than the statute. With that we have nothing to do,—as the law speaks, so it is our duty to speak.

Let the judgment be reversed and a new trial be granted.

McBEE vs. THE STATE.

PRACTICE. *Process—return of sheriff.* No averment can be allowed against a sheriff's return. If untrue, the remedy is by action on the case for a false return.

PLEADING. *Demurrer to plea in abatement—judgment.* The judgment on demurrer to a plea in abatement is *respondeas ouster*. It is error to render judgment final. *Eichorn vs. Le Maitre*, 2 Wilson, 367.

The plaintiff in error, Samuel McBee, entered into a recognizance before a justice of Claiborne, on the 26th of July, 1836, for the appearance of one Pleasant McBee, in the circuit court of that county, on Tuesday after the fourth Monday of August thereafter, to answer a charge of forgery. This recognizance was forfeited, and to a *sci. fa.* issued thereon, the sheriff returned—"Executed on Samuel McBee on the 9th of September, 1836,—Pleasant McBee not found in my county, this 6th day of September, 1836." To an *alias sci. fa.* he made the same return, April 10, 1837.

The plaintiff in error craved *oyer* of these returns, and pleaded that the sheriff had not made said writs of *sci. fa.* known to him, &c., and prayed that they be quashed, &c. Two terms after the filing of the plea, the attorney general moved and obtained leave for the sheriff to amend the returns by striking out the words—"executed on," and inserting instead—"made known to," and demurred to the plea.

At May term, 1838, ANDERSON, Judge of the 12th circuit, sustained the demurrer, and proceeded to render judgment—"That the State of Tennessee recover against the said Pleasant McBee and Samuel McBee the sum of two thousand dollars, the amount of the recognizance in the *sci. fa.* mentioned, together with the costs," &c.

The plaintiff in error having excepted to the amendment

allowed by the court, appealed in error from the judgment pronounced on the demurrer.

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PECK, for the plaintiff in error.

GEO. S. YERGER, Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is an action on behalf of the state to recover the amount of a forfeited recognizance, to which defendant pleads in abatement, that the *scire facias* was not made known to him either by being read or a copy delivered to him. To this plea there is a demurrer, which was sustained by the court and judgment final given thereon against the defendant, to recover which this writ of error is prosecuted. June 15.

There are several questions made, which we deem it unnecessary to notice, as they are most clearly against the defendant. But the question most relied on is as to the correctness of the opinion of the court in sustaining the demurrer and the judgment final rendered thereon.

The demurrer was properly sustained. No averment can be allowed against the return of the sheriff,—if his return be false the defendant's remedy is by an action on the case for a false return.

But it is said that the judgment of the court upon sustaining the demurrer ought not to have been final, but that the defendant answer over. This proposition is unquestionably true. In the case of *Eichorn vs. Le Maitre*, 2 Wilson's Rep. 367, the court of C. B. says, that "if issue be joined upon a plea in abatement, and the verdict be against the defendant, the judgment ought to be final, because every man must be presumed to know whether his plea be true or false; but upon a demurrer to a plea in abatement there shall be a *respondas ouster*, because every man shall not be presumed to know the matter of law which he leaves to the judgment of the court." This is the leading case upon this subject, and having never been questioned since its determination, it is conclusive upon the question under consideration.

But it is said by the attorney general, that the judgment of the court is a judgment by default for want of a plea to the merits which defendant neglected to file when he might

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well have done so. This answer to the objection cannot avail. The judgment of the court is in these words; "It is considered by the court that the said demurrer to said plea be sustained; and said *scire facias*, as against said defendant being undefended further, upon motion of the state by the attorney general, it is considered by the court that the State of Tennessee recover," &c. This is a final judgment upon the demurrer, and not a judgment by default; and moreover, no judgment by default could have been regularly taken until the defendant had neglected to plead to the merits upon a judgment of *respondens ouster*.

The judgment of the court below will therefore be reversed and the case remanded for further proceedings.

KIRKPATRICK vs. THE STATE.

JURISDICTION. *Bastardy.* Questions of filiation are not jury causes, and the jurisdiction of them is, therefore, not taken from the county court by the act of 1835, c 6, § 3, and c 5, § 7.

BASTARDY. *The issue in is to the court,* *Goddard vs. The State*, 2 Yerger 96, approved. It decided that the act of 1822, c 29, meant to confer on the county court, without a jury, the power "to hear the proof and determine the matter" involved in the issue in bastardy causes, and meaning that, it was nevertheless constitutional. *The State vs. Coatney*, 8 Yerger, 210. is not inconsistent with that decision.

SAME. *Power of the court.* It seems that the county court, if they saw fit, might have the aid of a jury to try the issue, without such proceeding constituting an error for which the supreme court would reverse.

Kirkpatrick was brought before a justice of the peace for Blount county, on the 31st of January, 1838, upon a charge of *bastardy*. He there entered into bond with sureties for his appearance in the circuit court of that county on the first, after the fourth, Monday of May, 1838, to answer the charge. He appeared and entered into the usual bond to indemnify the county, and to abide by and perform any order the court might make for the support and maintenance of the child. And his Honor Judge Scott, who presided, thereupon ordered that he should pay the mother of the child forty dollars for its support for the first twelve months, the costs,

&c. His counsel, supposing jurisdiction of the matter not to be vested in the circuit courts, advised an appeal, which was prosecuted. *Sawyer vs. The State* depended upon the same question. Kirkpatrick
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REESE, J. delivered the opinion of the court.

These are causes arising under the act of 1741, c 14, against the putative fathers of bastard children. And the question presented by the records for our determination is, to which court, the county or the circuit court, does the jurisdiction over such causes appertain? To determine this question we must refer to the acts 1835, c 6 and c 5. June 15.

The seventh section of the act of that year, c 5, confers upon the circuit courts general jurisdiction in all suits of law, and to administer right and justice according to law in all cases where the jurisdiction is not conferred upon another tribunal. They also have exclusive jurisdiction in all causes triable by jury, both criminal and civil, of which the county courts had jurisdiction. Upon the county courts, by the third section of the act of 1835, c 6, is conferred jurisdiction by the laws then in force, except that they shall not have jurisdiction of any pleas, real, personal, or mixed, nor of any cause civil or criminal, wherein by the constitution and existing laws of this state the parties are now entitled to a trial by jury, nor shall said court have power to empanel a jury in any cause whatever.

Before the passage of these acts the jurisdiction of the county court was exclusive in questions of filiation arising under the act of 1741, c 14. The bond which that act requires to be given for the indemnification of the county, is to be made payable to the justices of the county court. One condition of the bond is, that the party shall perform such order, touching the maintenance of the bastard child, as that court may from time to time make. The act of 1822, c 29, § 2, provides that at the end of three years allowances shall cease, and that the county court shall dispose of the bastard child as shall most conduce to its interest, either by giving it to the reputed father, or binding it out to some suitable person in their discretion.

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This whole proceeding of filiation partakes in its character of a county, rather than any more general interest, and the chief object is to indemnify the county against liability to maintain a pauper. It is a matter of county business.

What then has taken from the county court a jurisdiction so natural and so proper to it, and which it has so long possessed? It is said to be the act of 1835, above quoted, in connection with the provision of the first section of the act of 1822, c 29, which permits the putative father to file on oath a negation of the charge, upon which being done, "the court may hear proof and determine the matter as to right and justice may appertain." This, it is said, entitles the party to a jury, and of course, the acts of 1835 transfer the jurisdiction to the circuit court. Within a short time after the passage of the act of 1822, the supreme court in the case of *Goddard vs. The State*, 2 Yerger 96, determined that the court could, in the language of the act, hear the proof and determine the matter, and that the parties had no right to a jury.

This cotemporaneous decision has not since been overruled. In the case of *The State vs. Coatney*, 8 Yer. 210, there seems indeed to have been a jury in the county court. But that circumstance constituted no part of the discussion before the court, and forms no ground of the decision. And, indeed, it would follow; that if the court might hear and determine the matter, they might, if they saw fit, perhaps have the aid of a jury, without such proceeding constituting an error for which the supreme court would reverse.

These questions of filiation therefore are not jury causes, and by the very terms of the third section, of the act of 1835, c 6, are left with the county court, while there is nothing in the seventh section, of the act of 1835, c 5, to transfer the jurisdiction to the circuit court.

The judgment, therefore, in these cases will be reversed, and the parties be bound to the county court to be proceeded against.

CROCKER vs. THE STATE.

GRAND JURY. Secrecy. The reason of the injunction of secrecy in the oath of the grand jury is one of public policy—namely—that the evidence produced before them may not be counteracted by subornation.

SAME. Witness—Competency. But if a witness, who is examined before the grand and petit juries, give contradictory testimony, and is indicted for perjury committed therein, the members of the grand jury are competent witnesses to prove the contradiction. 4 Bl. Com. 126, n. 4.

Crocker was indicted by the grand jury of McMinn, at April term, 1837, of the circuit court of that county, for a perjury assigned to have been committed in giving testimony before the same grand jury, at the same term, upon a bill of indictment, preferred against Hiram K. Turk, charging him with an assault and battery upon Crocker, with intent to commit murder in the first degree. On the trial of Crocker, before KEITH, Judge of the third circuit, and a jury of McMinn, at July term, 1837, the accusation against Turk being still depending, the attorney general, FRAZIER, offered several of the grand jurors, by whom the bill of indictment against Turk, as well as that against Crocker, had been found as witnesses to prove what had been sworn by Crocker before them on the bill against Turk.

The counsel for Crocker objected to the swearing of them as witnesses on the ground that the prosecution against Turk was still pending. The objection was overruled, the court observing, that it would come, if at all, more properly from the jurors offered as witnesses, than from the defendant. The first juror offered as a witness thereupon made the objection, and the defendant, by his counsel, claimed the benefit thereof. The attorney general waved the right of the state to prosecute the jurors for any disclosures they might make as witnesses in this case. To this waiver the defendant's counsel objected, on the ground that the defendant was prosecutor against Turk on the indictment upon which he had given evidence before the grand jury. The court overruled the objection, and stated to the juror offered as a witness, that he might proceed to give testimony of the facts sworn by Crocker before the grand jury. The testimony was heard, and Crocker was convicted, and a rule for a new trial having

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been discharged, and judgment pronounced against Crocker, he appealed, having filed his bill of exceptions, stating the evidence at large, and excepting to the opinion of the court in allowing the attorney general to waive the privilege of the grand jury, and requiring the jurors, as witnesses, to disclose the testimony given before them as grand jurors, by the defendant on the indictment against Turk.

JOHN H. CROZIER and THOS. C. LYON, for the plaintiff in error, argued, that grand jurors were bound by their oath to keep secret what transpired before them in the grand jury room. Formerly, if grand jurors disclosed the evidence on part of the state, they became accessaries to the offence, if felony, and if treason, principals, and at this day it is in general a high misprision. 1 Chit. Crim. Law, 317; 4 Bla. Com. 126; Roscoe on Ev. in Crim. Ca. 149; and Russell on Crimes, &c. &c.

They said they did not contend that a witness who has committed perjury before a grand jury cannot be indicted, but that it cannot be done until the matter about which he testifies is finally disposed of; and that in this they were supported by the law, heretofore referred to, and the following reasons. .

1. Every prosecution of the kind must be based upon the criminality of the grand jury. We have seen that the oath they take imposes on them the injunction of secrecy, this injunction lasts until after the trial of the defendant, because the reason of the injunction is, to prevent the defendant from suborning witnesses to contradict the testimony of the state, and by these means establish his own innocence. Every grand juror, then, who discloses the testimony on the part of the state, before the reason for which the injunction of secrecy was imposed ceases, is not only guilty of a high misprision, but also commits moral perjury. Will courts of justice tolerate crime in one individual, or set of individuals, for the purpose of detecting and exposing guilt in another? To recognise the converse of the old maxim, "Do not evil that good may come," would sap the very foundation of all morals and civil government, yet we think it has been clearly done in the present case.

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2. No injury could result to public justice from a postponement of the prosecution of one who swears falsely before a grand jury, until after the cause is tried, but great evils might arise out of a contrary course. The powerful inducement that would be held out to defendants to prefer charges of perjury against the principal witnesses on the part of the state, and to support those charges by the testimony of ardent and zealous friends, or those who could be approached by rewards, would finally lead to cross indictments in almost every criminal case.

3. The testimony delivered before the grand jury not being controlled by persons of legal learning, must necessarily be vague and loose. Impressions and hearsay must frequently be taken for positive assertions of the witnesses own knowledge; this might probably be altogether explained, guarded by the astuteness of counsel and watchfulness of the presiding judge on the trial.

4. No authority has been produced of any analogous case having occurred, either in the United States or England. The total absence of authority, where the material for prosecutions of this kind must have frequently existed, is a strong reason against the legality of this course. A case is mentioned in a note in 4 Blackstone, 126, where a grand juror secretly disclosed to the presiding judge that a witness had sworn directly contrary on the trial to what he had testified before the grand jury, and the witness was indicted for perjury, and convicted. In this case, however, the reason of the law imposing secrecy on the grand jury had ceased, for as the trial was progressing at the time the disclosure was made the matter about which the witness was testifying, must have been disposed of before he could have been tried and convicted for the perjury.

GEO. S. YERGER, Attorney General for the state, insisted that the principle that grand jurors are not to reveal what takes place in the grand jury room is one of policy; it was established to prevent subornation of perjury, and is a privilege in favor of the government, which, like any other privilege, may be waived, 4 Blk. Com. 126, note 4; Chit. Cr. Law, 260.

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This privilege does not incapacitate the juror, and he is not, from the mere fact of being a juror, rendered incompetent. No writer upon evidence, in treating of the different things which render a witness incompetent, as interest, infancy, want of legal discretion, &c., ever dreamed of a grand juror being rendered incompetent by his oath.

All the cases which can be cited, where the juror's testimony was refused, were between individuals, where the government had not waived the privilege, until which the juror was privileged from swearing.

TURLEY, J., delivered the opinion of the court.

June 16.

The prisoner was convicted of the crime of perjury upon the testimony of several members of the grand jury, and it is now assigned as cause of error that grand jurors are incompetent witnesses to prove facts deposed to before them.

It is unquestionably true that grand jurors are bound by the terms of their oath not to disclose what may transpire before them, and if they transgress in this particular they are fineable; but there can be no doubt that this required secrecy is not intended to secure a guilty witness from punishment for the crime of perjury if committed, but to secure a correct administration of justice, and to prevent the evidence produced before the grand jury from being counteracted by subornation of perjury on the part of the defendant. It is for reasons of public policy then, that grand jurors are prohibited from disclosing facts deposed to before them; but if public policy or justice to an individual likely to be injured by the perjury of a witness, requires that it should be done, the courts must have the power of releasing the jurors from the obligation imposed on them by the law, and receiving their testimony, or be the means of working injustice to those under their protection.

It accordingly has been held that when a witness examined on the trial swears directly the reverse of the evidence given before the grand jury, they are at liberty to state this circumstance to the judge, who may direct him to be prosecuted for perjury on the testimony of the grand inquest, 4 Blackstone, 126, n. 4. And can any one doubt that if a wit-

ness be swearing away the life or liberty of an individual, and it can be proven by a grand juror that there is a direct and palpable contradiction in his testimony, detailed before the grand jury and petty jury that he shall be heard? Surely not. If then the court have the power, at their discretion, to examine grand jurors as to facts which may have transpired before them, there is an end of the question;—for it being matter of discretion, the exercise of it cannot be assigned for error in a revising tribunal.

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It is unquestionably a delicate discretion, and ought not to be exercised except in those cases where it is necessary to a correct administration of justice, either in punishing the guilty or protecting the innocent. But of the propriety of its exercise, the court below must judge, and judge exclusively, for it is impossible in the nature of things for a court of errors to review its decision.

Judgment affirmed.

CHUNN vs. CHUNN.

HUSBAND AND WIFE. *Divorce a mensa—alimony.* Upon a divorce *a mensa et thoro*, the marriage is allowed to have been valid, and to have invested the husband with the wife's property; and, therefore, the practice is not to decree the wife absolutely a part of the husband's real and personal estate, but only to allot her some portion of his *income* for her support, securing the payment, if necessary, by charging it upon his estate.

SAME. *Divorce a vinculo—decree thereupon—1799, c 19, construed.* But, upon a divorce *a vinculo*, the marriage is adjudged void *ab initio*, and the *title* to the lady's property remaining, therefore, unaffected by it, the *possession* is restored to her. And the same rule is to be observed in decreeing a divorce under the act of 1799, c 19, though it allows a divorce *a vinculo* for supervenient causes.

SAME. *Debtor and Creditor.* A husband, who is sued for a divorce and alimony, cannot resist a decree, because his creditors may be affected by it; nor, in ascertaining the alimony, will the court take an account of his debts.

CONSTITUTIONAL LAW. *Partial laws.* An act of assembly is not unconstitutional, as a partial law, because it excepts, from its operations, existing suits.

William Neilson died many years ago, seized and possessed of a considerable real and personal estate. He left three infant children, his heirs at law, of whom Catherine Jane,

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the petitioner was one. In November, 1825, she intermarried with Joseph S. Chunn, of Jefferson county, by whom she had several children. On the 20th of January, 1836, she filed her petition in Jefferson circuit court against her husband, charging him with cruelty, with offering her personal indignities, and with adultery; stating that her property, at the time of her marriage was of the value of eighteen or twenty thousand dollars, and consisted of twenty-two slaves, an interest in the Warm Springs in Buncombe county, North Carolina, afterwards sold by her husband for ten thousand dollars, and several thousand dollars in money, bonds, &c.; that her husband had sold ten of the slaves; that he had bought three others, partly, at least, with the proceeds of her estate, and 800 or 1000 acres of land; that he had wasted her estate to a considerable extent, &c. &c.; and praying for a divorce *a vinculo matrimonii*, and for such part and portion of the real and personal estate of the defendant as the court might think proper.

To this petition the defendant filed a demurrer, which was overruled at September term, 1836. On the 18th of January, 1837, he pleaded, 1—Not guilty of the several charges of adultery, or either of them, and this, &c. 2—That the petitioner, before filing her petition, to wit, on the 1st of November, 1827, and on divers other days and times, after the intermarriage, did commit adultery with a certain William N. Gillispie, and this, &c. 3—That she did, on the 1st of November, 1827, &c. commit adultery with a person unknown to defendant, and this, &c. To these pleas the petitioner replied and tendered issues to the county. 1—That the defendant is guilty of the adultery laid to his charge in the petition. 2 and 3—That she did not commit adultery, in the terms of the pleas.

At May term, 1837, the petitioner moved the court to order that the issue tendered in the replication be tried by a jury, which was ordered accordingly. On a subsequent day of the term, the defendant moved to reject or strike out the replications, but the court refused to do so, and decided that the cause was at issue upon said replications, and that no

similiter, or other answer was necessary on part of the defendant, which decision was excepted to by the defendant.

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At May term, 1838, the cause was tried upon the issues joined, before his Honor Judge ANDERSON, of the twelfth circuit, and a jury of Jefferson county, to whom evidence was submitted by the petitioner, tending to prove the charges in the petition. The jury returned the following verdict:—

That the defendant is guilty of adultery as charged in the petition, and as alledged by petitioner in her replication to the defendant's first plea; that the petitioner is not guilty of adultery with William N. Gillispie, as in her replication to the second plea she hath alledged: and that she is not guilty of adultery with any person known or unknown, as in her replication to the third plea she hath alledged.

On the 12th of May, 1838, his Honor pronounced a decree dissolving the marriage and restoring the petitioner to all the rights of a *feme sole*; divesting the defendant of title to certain enumerated and described tracts of land, and vesting it in her and her heirs for ever; and also of title to eighteen slaves by name, and vesting them in her and her heirs for ever; directing that a certain pleasure carriage and harness be transferred to the petitioner, all said property having been received by the defendant as the property of his wife, or as the proceeds thereof; and that the hire of certain negroes, who had been taken into the hands of the sheriff, and hired out by him under a previous order, be paid to the petitioner; and that the defendant pay the costs, &c.

From this decree the defendant appealed in error.

PECK and G. S. YERGER, for petitioner.

J. A. MCKINNEY and HYNDs, for the defendant.

TURLEY J. delivered the opinion of the court.

The facts upon which petitioner's right to a decree depends, were submitted to a jury in the court below, and were all found in her favor. The propriety of the finding has not been questioned, and it is unnecessary for us in relation thereto, to say more, than that there is nothing, which, in our estimation, tends to sully the purity of one, who seems

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to be esteemed and loved by all who know her, except her husband.

The decree, however, is sought to be impeached upon the ground, that more property has been given to the petitioner than is authorised by law, or is consistent with the rights of the defendant and his creditors. It is said, and no doubt truly, that all the property, remaining in the possession of the defendant, has been by this decree secured to the petitioner. But then the proof shows, most clearly, that it all belonged to her at the time of the marriage, and that it constituted but a small portion of the property, which the defendant received by her; the balance of which has been, by him, sold and appropriated.

By the provisions of the tenth section of the act of 1799, c 19, "it is made the duty of the court, on making up their decree, to decree to the wife divorced such part of the real and personal property as they shall think proper consistent with the nature of the case." It is said, for the defendant, that this discretion on the part of the court, is not to be exercised capriciously, but in deference to the rules of practice, and that no case can be found, in the English authorities, where more than one half of the husband's income has been allotted as alimony for a divorced wife. This is true, but it is to be observed, that in England, divorces *a vinculo matrimonii* are not allowed by law, but for causes which vitiate the marriage in its inception and render it void *ab initio*; therefore all the questions as to what amount of alimony shall be allowed the wife, have arisen upon divorces *a mensa et thoro*, and the practice, in such cases, has been, not to decree to the wife absolutely a portion of the real and personal estate of the husband, but only to allot a certain portion of his income for her support, the payment of which may be secured by being charged upon his estate. The reason for this practice seems to be, that the bonds of matrimony have not been dissolved; that the parties are not intended to be restored as near as may be to the same situation they occupied before the marriage; that the wife, not having it in her power to establish herself in life again by marriage, has no need for any thing more than a comfortable maintenance; and that

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the law still looks to a reconciliation between the parties, which would be rendered almost impracticable, if the property were divided absolutely, each one taking his own. Yet it may be observed that, in the case of *Smith vs. Smith*, Arches court, M. T. 1813, and T. T. 1814, referred to in Poynter on Marriage and Divorce, 87, n. (1), Law Lib. Ed., the court says, "as it is a rule of equity, that no man shall take advantage of his own wrong, perhaps it would be just, that where the husband violates the matrimonial engagement, and the fortune originally belonged to the wife, he should give back the whole of it." There seems to be much reason in this remark, a contrary practice, however, has prevailed in England, which, as applicable to divorces *a mensa et thoro*, we would have no disposition to unsettle.

But, in our opinion, a very different rule of practice ought to be applied to cases of divorce *a vinculo matrimonii*. There, the bonds of matrimony are dissolved; there, the parties are intended to be restored, as near as may be, to the same situation they occupied before the marriage; there, the wife has it in her power to establish herself again by marriage; and there, the law looks to no future reconciliation between the parties. Accordingly it has always been held, in England, that in cases of divorce, *a vinculo matrimonii*, the wife shall take all the property, which belonged to her, at the time of the marriage. But it is said, this was because the marriage was void *ab initio*, and the husband acquired no right to her property, by the marriage. This is true, and, therefore, there is no necessity of a decree of a court divesting his title; but this proves nothing more than the truth of the proposition, that the husband acquired no right by the marriage. It does not prove, nor tend to prove, that it would not have been equity and justice to have divested these rights, if he had acquired any. On the contrary, no one can doubt, that where the bonds of matrimony are dissolved, the parties ought to be placed, as near as may be, in the same situation they occupied before the marriage.

The act of 1799, c 19, enumerates, as causes for a divorce, *a vinculo matrimonii*, impotency, bigamy, adultery, and two years desertion. Here are causes, which vitiate the

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marriage at common law, and statutory causes, for a divorce *a vinculo*, enumerated in the same section. Can it be, that the legislature, when they declared that all of them should alike constitute good grounds for a divorce *a vinculo*, intended a rule, as to the disposition of the property, to be applied in one case, which was not to be applied in another? When the bonds of matrimony are dissolved, no matter for what cause, there is just reason for restoring, at least, the injured party to the same situation, as near as may be, occupied by him or her, before the marriage. This, we think, the court has the power, in its discretion, to do, under the provisions of the act of 1799, c 19.

But it is said, that this act is repealed by the act of 1835, c 26, which makes different provisions, and only authorises the court to allot *alimony*, in cases of divorce *a vinculo*, as in cases of divorce *a mensa*. By the twenty-third section of that act, it is provided, that it shall be in force from and after its passage, and that nothing therein contained, shall be so construed as, in any way or manner, to effect any suit, that may be already brought and undetermined, in any of the courts of this state, for a divorce either total or partial; but said suits shall remain and be proceeded in, heard and determined, by said courts, according to the laws in force at the time of bringing the same. This suit was pending before the passage of the act; but it is said, that the proviso is unconstitutional and void. We do not think so. It is, we apprehend, for the first time, contended, that the legislature has not the power, when about to establish a new rule of action, to give to it an operation entirely prospective. We think, therefore, there is no law either written or unwritten which forbids this decree.

But 2. has any injury been done by the decree to the defendant? Surely not. Shall a man, who has violated his matrimonial vows, in every disgusting form, and, by harsh and unkind treatment, force his wife to seek protection in a rescission of her nuptial contract, be heard, when he asks a support out of her estate? It is mockery, worse than mockery.

But it is said 3. that there are creditors, whose rights

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ought to be protected, and that, for this purpose, an account ought to be taken. The rights of creditors stand in a very different light from those of the defendant, and the court would be disposed to protect them, so far as it could, but it does not see how this can be done by taking an account. The creditors are no parties to this suit, and, therefore, no action of the court can effect their rights, and it cannot possibly decree a satisfaction of their debts; and, to leave a portion of the property in the hands of the defendant, for that purpose, would be no security at all. The defendant has no right or power to resist the decree, by constituting himself the guardian of his creditors.

But still this court will, so far as it can consistently, attend to their interest, and will, for that purpose, leave out of the decree, the lands of the defendant, because they, having been sold, there is nothing but an equity of redemption, of which he cannot deprive his creditors, and because we do not consider it necessary or prudent, to involve the petitioner in any controversy which may arise out of an offer, on her part, to redeem under the decree. And the tract of land of one hundred acres, said to belong to the father of the defendant, will also be left out of the decree.

The decree of the court below, with the exception of this modification, will be, in all things, affirmed.

HOUSE vs. MITCHELL.

ANCESTOR AND HEIR. *Heir's liability on ancestor's covenant of warranty.*

All the heirs constitute but one representative of the ancestor, and their liability upon his covenant of warranty, is, in its nature, joint, and it is not made several also, by the act of 1789, c 57.

SAME. *Practice—original writ—process.* In an action against heirs on their ancestor's covenant of warranty, the original writ must be sent out against all, and if it be served on some, and returned *non est inventus* as to others, the plaintiff must sue out an *alias* and *pluries* against those not served, before he can declare against those sued.

SAME. *Pleading, abatement—heirs must be joined.* In an action against heirs on their ancestor's covenant of warranty, if the defendants plead that there are other heirs not sued, a replication—that they reside beyond the jurisdiction of the court, and that those sued are the only heirs who have any thing by descent, is bad upon general demurrer.

On the 13th of March, 1793, James Allison, by deed of bargain and sale, conveyed to John Johnson a tract of land, by metes and bounds, containing 300 acres, situate in Washington county, Tennessee. In this deed he covenanted for himself and his heirs with Johnson and his assigns to warrant and forever defend the land to Johnson and his heirs and assigns against all persons whatsoever. On the 11th of November, 1797, Johnson conveyed the same land to George House, the plaintiff, by deed of bargain and sale with similar covenant of warranty. And on the 29th of August, 1801, House conveyed the land to Peter French with like covenant.

After the conveyance by Allison to Johnson, one Ephraim Murray entered 118 acres of the land as vacant and unappropriated in the office of the Surveyor General of the district in which it lies, and obtained a grant for it. Upon this title Murray sued French in ejectment and evicted him from the 118 acres. The heirs of French thereupon sued House upon the covenant of warranty in his deed to their ancestor, and on the 5th of August, 1828, recovered judgment against him for \$843 44½ cents damages and costs. To recover over against the heirs of Allison, House brought his action of covenant upon the clause of warranty in the deed from Allison to him, in Washington circuit court.

The *capias* was issued September 13, 1832, to the sheriff of Washington against James A. Mitchell, Owen Roberts

and Jane his wife, and William Collom and Eliza his wife. The sheriff returned the writ executed on Mitchell and Roberts and wife, and as to Collom and wife, that they were non-residents. An *alias* and *pluries* were issued on the 10th of February and 17th of August, 1834, respectively, to the sheriff of Washington, and returned in the same way as to Collom and wife. House, thereupon, at July term, 1837, filed his declaration against Mitchell and Roberts and wife, as heirs at law of Allison who was grand father of Mitchell and Mrs. Roberts.

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The defendants pleaded in abatement, that besides themselves there were other heirs of the James Allison in the declaration mentioned, and set out their names and places of residence, averred that they were still alive, and concluded—"wherefore, because they are not, nor is either of them named in the said writ and declaration, the said defendants pray judgment of the said writ and declaration and that they may be quashed," &c. This plea was verified by the oath of the agent of defendants.

The plaintiff replied, "that on the day of the suing out of the original writ in this case, to wit: on the 13th day of September, 1832, the defendants, James A. Mitchell, Owen Roberts and Jane his wife, and William Collom and Eliza his wife, against whom said writ issued, were the only heirs at law of James Allison, deceased, who resided, at that time, in the state of Tennessee, and within the jurisdiction of the court: and they were also the only heirs at law of said James Allison, who had any assets of the said James in the plea mentioned, in their hands by descent from him; and on the day of suing out the writ, all the other heirs of said James mentioned in the plea, resided beyond the limits of the State of Tennessee," and concluded with a verification. To this replication, the defendants demurred, and the plaintiff joined in demurrer.

At March term, 1838, the demurrer was argued before Judge POWELL of the first circuit, who sustained it, and gave judgment that the suit be abated. The plaintiff appealed in error.

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J. A. McKINNEY for the plaintiff.*

LUCKY and R. J. McKINNEY for the defendants, said that a part of the heirs at law of a warrantor could not be sued upon a covenant, and part left out; to which point they cited Hammond on Parties, 143; 1 Chitty's Pl. 39, 40; 1 Com. Dig. Abatement, F.; 9 Viner's Ab. 67; 7 Bac. Ab. Warranty, N. That a portion of the heirs being out of the jurisdiction of the court does not authorize a suit to be brought against those who are within the jurisdiction, 6 T. R. 327; 18 Johnson's R. 253; 1 Strange, 473; 1 Haywood, 283.

REESE, J. delivered the opinion of the court.

June 21. This is an action against a portion of the heirs of a warrantor, in a deed of bargain and sale, after an eviction of the bargainee; and the question is—whether the writ should not have been sent out against all the heirs? and, whether if any of them could not have been found, or were citizens of another state, the legal means, in force in this state, should not have been exhausted, by like issuance and return of an *alias* and a *pluries* writ, before the plaintiff would be at liberty to proceed against that portion of the heirs, upon whom process may have been served?

We think all the heirs should have been sued. They all constitute but one representative of the ancestor. The claim against them is joint, and of that character to be unaffected by the provisions of our act of Assembly, 1789, c 57, making certain liabilities joint and several. They must, therefore, all have been sued.

But it is argued with much force and ingenuity, that, as the process of outlawry does not exist in this state, to issue a writ, and an *alias* and *pluries*, steps necessary before a party could, in England, be outlawed, would be useless here. The practice, however, has always been followed with us, and it was sanctioned by the early case of *Sherwood vs. Davis*, in 1 Haywood, 283, and has never been departed from. The evil of the delay, which the practice produces, is perhaps more than counterbalanced by the chance furnished of

*The late Reporter left no memoranda of the argument of the plaintiff, nor any brief of the counsel.
[REPORTER.]

the non-resident party coming within the jurisdiction of the court, before the return of the *pluries*.

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The Legislature has, by statute, 1784, c 11, § 4, adopted a similar practice in case of *scire facias* against heirs, requiring, as against the non-residents, the return of two *nils*. The practice, in question, moreover, has been so long and so uniformly pursued, that if we deemed it inconvenient, and, at present, unsustained by the grounds which originally led to its adoption, we should hesitate to change it, but should refer those who might wish to do so, to the Legislative Department.

Let the judgment be affirmed.

NOTE Though heirs in our law, who are in by descent, are tenants in common, yet they are so far like coparceners at common law, that they are *quasi unum corpus*; one of them is not part of an heir, but all of them are but *unus haeres*. Co. Lit. b. 163, Lit. § 313.

As to the process necessary to enable the plaintiff to declare against those not served, besides the case in 1 Haywood, see *Anonymous*, 2 Haywood, 70; *Price vs. Scales*, 2 Murphy, 199; and the analagous case, *Whitaker vs. Young*, 2 Cowen, 569. Where there are two defendants, and only one has appeared or is in custody, then after proceeding to outlawry against the other, it is the practice to declare against him alone who has appeared, stating the outlawry of the other in the commencement of the declaration, 2 Archbold's Pr. 178, 179; Lee's Dictionary of Pr., Outlawry and *capias utlagatum*. After the outlawry, the outlaw was proceeded against by general or special *capias utlagatum*, whereby he or his estate was made liable to the satisfaction of the plaintiff's demand, 2 Archbold's Pr. 177, 178; 2 Lilly's Ent. 465, 466; Archbold's Forms, 524. Quere, what proceedings can be had, by our law, against the party as to whom the *alias* and *pluries* have been returned *non est inventus*?

As to our common covenant of warranty, and the remedy thereupon. See 4 Kent's Com. 468, to 490, and cases there referred to.

JORDAN *vs.* BLACK.

HUSBAND AND WIFE. *Conveyance in fraud of marital rights.* A disposition made by a *feme sole* of her property after a contract of marriage and before solemnization, will be fraudulent as against the husband who has been kept ignorant of the transaction. 2 P. W. 674; 2 Bro. C. C. 345; 1 Ves. Jr. 22; 2 Cox, 28; 1 Cond. Eng. Ch. R. 188.

SAME. *Same—exceptions.* This rule is perhaps without exceptions, so far as by implication, it denies the husband the power to disturb a disposition of which he was informed before the marriage. But so far as it affirms his power to set aside a disposition concealed from or unknown to him, it admits it seems of two classes of exceptions—1, founded on the meritorious objects of the conveyance—2, on the husband's situation as to pecuniary means. 7 Cond. Eng. Ch. Rep. 194, 195.

SAME. *Conveyance of slaves to a trustee.* If a *feme sole*, between the contract and solemnization of an intended marriage, convey her slaves to a trustee to emancipate them at her death, and the intended husband be informed of the conveyance before the solemnization, the court, without inquiring whether the object of the conveyance were meritorious, and without laying any stress on his pecuniary situation, would not entertain the husband's bill to set aside the conveyance.

SAME. *Effects of such conveyance.* Such a conveyance vests the trustee with the legal title, and the *feme* with an equitable life estate in the slaves, and a sale of them by the husband is equally an injury to both interests.

Gideon Morgan, Sen., of Kingston, by his will made and published on the 8th of May, 1828, gave a large and valuable portion of his real, and all his personal estate, including his slaves to his wife, Elizabeth. She, about the middle of the afternoon of the 7th of October, 1834, being on that evening to intermarry with Hambright Black, the defendant, who had no property, and was much embarrassed by his debts, sent for Henry S. Purris, deputy clerk of the county court of Roane, and requested him to draw a deed, in which, after reciting the intended marriage, and that she was absolute owner of certain slaves by name, in consideration of the sum of one dollar paid by Lewis W. Jordan, the complainant, bargained, sold and conveyed to him, his heirs, &c. said slaves and their increase, but to remain in her possession, and be under, and subject to her control during her natural life,—not to be sold by Jordan, his heirs, &c., but to be held by him and them at her death, to emancipate them and their increase, to effect which emancipation, he and they were to have the right to hire them out for such time

as might be necessary to raise a fund sufficient for that purpose, reserving to herself the right to emancipate any, or all of them or their issue, at any time during her life.

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This deed she immediately executed and acknowledged before Purris, as deputy clerk, and requested him to cause it to be registered, which was done the same evening, and before the issuing of the license for the marriage. At its execution, besides Mrs. Morgan and Purris, no one was present, except Amanda Ashley, an inmate of her house, and C. W. Hardin, a clerk in her store, and he only part of the time. So soon as Purris had retired with the deed, she sent for Black to the tavern, whither he had gone but a short time before from her house, to dress for the wedding. On his arrival, according to the statement in his answer,—“she informed him of the attempt to make an arrangement for the freedom of the negroes; that Purris had written and taken away some instrument of writing, conveying the negroes to complainant for the purpose, but reserving to her the possession, control and right to emancipate them at any time during her life, and wanted to know what he thought of it. He told her it was entirely unexpected to him, and he could not consent to it; that it would place him and her in a situation he did not wish to occupy; that it would be virtually offering the negroes their liberty to shorten her life, &c. &c., adding other remarks to apprise her of the consequences of the measure, and make her hesitate before completing an arrangement, so evidently calculated to embarrass herself and him, and furnish grounds for apprehensions and fears in every way inconsistent with domestic happiness and peace. She replied, that she hardly knew what to do, but said the consideration mentioned in the instrument was only one dollar, which she had not received; that she did not consider that, or any other instrument binding until the consideration had been paid, and that she would not receive it.” He, being thus assured that the instrument, whatever might be its nature, was not executed, *as she understood it*, and that it should not be, remained with her till the marriage, which took place one or two hours afterwards.

The negroes continued in Black's possession after the mar-

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riage till the 8th of December, 1836, when the complainant filed his bill in the chancery court at Kingston, stating the above facts, and that Black claimed the negroes as his own property, notwithstanding the deed; had repeatedly offered to sell them as slaves; that he had recently confessed certain judgments, and had directed the sheriff of Roane to levy executions thereof on the negroes and sell them as his property; that he had threatened to sell them out of the country, and charging that he would do so unless restrained; that complainant would, if not prevented, execute the trust vested in him by the deed of Mrs. Black, who still desired it to be done, and was unwilling that the negroes should be sold: praying that Black might be perpetually enjoined from selling, or sending off out of his possession all or any of said negroes; that he should be enjoined to keep them in his possession for the use of his wife and himself until her death, should he survive her, to the end that the trust might be executed, and for general relief.

Black's answer stated the facts relative to the execution of the deed and his knowledge of its existence as they are above detailed; and the proof corresponded therewith. There was much other proof, but the above statement exhibits all of it that is necessary to present the questions of law debated and decided.

The cause was brought to hearing, at March term, 1838, of the chancery court, before his Honor Chancellor WILLIAMS, who dismissed the bill without prejudice. The complainant appealed.

J. H. CROZIER and G. S. YERGER, for complainant. 1. The only question in cases where fraud upon marital rights is charged is—was the conveyance made without the privity, i. e. without the knowledge of the husband? If it was, in most cases it would be void. If not, in all cases, it would be good. 1 Ves. Jr. 28; 1 Story's Eq. § 273; Newland Cont. 424, 428; *St. George vs. Wake*, 7 Eng. Cond. Ch. R. 188; 1 Russell, 490. All the elementary writers say it must be done without the privity of the intended husband. "Privity" means joint knowledge with another of a private concern, implying often consent and concurrence. It is not

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a question, however, of contract, requiring his assent or agreement, other than that which is to be inferred from knowledge of the deed, and consequent solemnization of the marriage. It is for fraud, not for want of assent, that the transaction is to be impeached; and the fraud consists in conveying after a treaty of marriage, and concealing the fact from the husband. But if the husband had *notice* before the marriage, though but ten minutes before, it is no fraud on him; he need not have consummated it. The secret conveyance would be a good defence to an action for breach of promise of marriage. 7 Cond. Eng. Ch. R. 192, and authorities above cited.

2. Here Black had knowledge of the fact that the deed had been made. Her erroneous conclusion, that it could not operate without payment and receipt of the nominal consideration, does not alter the law. It is the defence of ignorance of the law. *Shotwell vs. Murray*, 1 John. C. R. 512; 6 Id. 169; 8 Yerger, 500. She distinctly informed him of all its contents, and where it was, which was all the notice required. 1 Story's Eq. § 400. She did not inform him it was registered, because she did not know it; nor would it make any difference whether registered or not. In case it was not, it would only be void as to creditors and purchasers without notice.

3. But there is a class of cases, of which *Hunt vs. Matthews*, 1 Vernon, 408, is an example, in which notice to the husband is dispensed with, on account of the meritorious character of the object, and the husband's pecuniary circumstances and condition. Freedom of the slaves at Mrs. Black's death, is such a possibility as the law will notice and secure; *McCutchen vs. Price*, 3 Haywood, 211; *David vs. Bridgmon*, 2 Yerger, 559, 563; and as soon as the deed was made the slaves became vested with such an interest in their freedom as it is consistent with the policy of law to protect. *Fisher's negroes vs. Dabbs*, 6 Yerger, 119, 126, 128; act of 1833, c 81. Any instrument which expresses the volition of the master that the slave shall be free, is good as between the master and slave. 2 Yerger, 123, 126. It is therefore insisted, that as soon as the deed was made, the

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slaves acquired a right to have the provision for their benefit perfected; and that, in such case, no subsequent act of the party who makes the deed can divest the right of the slave.

4. The provision for the negroes will not be defeated by the fact that Jordan, the trustee, was not cognizant of the deed, for if he had refused to assume the trust, a court of equity would supply a trustee. Co. Lit. 113, a. note 2; 6 Ves. 663; 8 Ves. 570, 574; 2 Story's Eq. § 1058, 1061.

CHURCHWELL for the defendant insisted, that the deed was void because no consideration passed and no interest accrued to the negroes or to Jordan, at the time of its execution, and never could afterwards; 1 Harrison's Ch. 57; Cowper, 434; 4 Eq. R. 266; because it was not delivered till after the marriage, and then Black gave no assent to it either express or implied; because the power reserved to Mrs. Morgan destroyed the estate conveyed to Jordan, 2 Vernon, 510; Roberts on Frauds, c 6; because it is against the policy of law, and inconsistent with the safety and security of human life, equivalent to an offer of freedom to the negroes to destroy the life of their mistress, Newland on Cont. 497, 157; because it was signed after the treaty of marriage concluded, only an hour or two before the ceremony, privately, and without the knowledge or consent of Black, and therefore a fraud upon his marital rights. Newland 497; 1 Fonblq. 258, 270; 2 Vernon, 500; Reeve's Dom. Rel. 182; 2 Ch. R. 43; *Carleton vs. Dorset*, 2 Vernon, 17; *Pitt vs. Hunt*, 1 Vern. 18; 2 Vern. 270; 2 Atk. 421; 1 Story's Eq. § 273, and authorities cited.

But Black is to be regarded as a purchaser, and all the authorities, which show that a deed made to defraud subsequent purchasers, is void, equally apply to this case, 2 Ves. 11; 2 Atk. 481; 1 Fonblq. 148; and the notice which he had could not make that good which was void by statute, Newland on Cont. 358. Whenever the intent to deceive appears, the conveyance is void, and the pretence of discharging a moral obligation, will not save a fraud, or give merits where none existed before. Fonblq. 272: Newland on Cont. 352.

REESE, J. delivered the opinion of the court.

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June 21.

Elizabeth Morgan who was the relict of Gideon Morgan, Sen., and the owner of several negroes, of a mercantile establishment, and of valuable real estate, being without any children and of a somewhat advanced age, entered into a treaty of marriage with the defendant, who was a widower, with three children. He is much younger than Mrs. Morgan, and he was without property, and in debt at the period in question. On the day of the marriage Elizabeth Morgan executed a deed, in which she recited that she was about to enter into a marriage, and by which she conveyed all her negroes to the complainant in trust to be emancipated at her death, but in the mean time, and during her life, to remain in her possession and under her control; and she reserved power to emancipate them herself during her life. The marriage took effect.

The defendant, the husband, being about to sell the negroes in question, or some of them, the complainant has filed this bill to enjoin and restrain him from doing so.

The prayer of the bill is resisted on the part of the defendant, on the ground that the deed was in fraud of his marital rights, and that therefore a court of chancery shall not assist the complainant, or lend its aid and protection to the interests created by said deed. We will, for the present, consider this case as if it were a bill to set aside and cancel the deed to the complainant. The ground upon which relief is given against a disposition of property by the wife pending the treaty of marriage, is, that such disposition, if made without the knowledge of the husband, disappoints his just expectations. Such relief, therefore, can only be given in those cases where the husband has been kept in ignorance of the transaction up to the moment of the marriage.

If he has been informed of the wife's disposition of the property, he may on that ground refuse to carry the marriage into effect; if he do not this, but solemnizes the marriage he cannot afterwards set aside the disposition by her made of the property. The general rule to be gathered from all the cases is, that a disposition by the wife of her property after a contract of marriage, and before it has been solemnized, will be

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fraudulent as against the husband who has been kept ignorant of the transaction. 2 P. W. 674; 2 Bro. C. C. 345; 1 Ves. Jr. 22; 2 Cox, 28; 1 Mylne & Keene, 510; 7 Con. En. Ch. R. 168.

There are exceptions to this rule, where although the intended husband was kept in ignorance of the wife's disposition of the property, the disposition, nevertheless, has been held good, because the court took into consideration the meritorious object of the conveyance, or the situation of the intended husband in point of pecuniary means. But no case has been shown, or it is believed can be produced, where the intended husband being informed before the marriage, of the disposition of the property by the wife, has been permitted to set aside such disposition.

In the case before us, it appears from the answer, that after the execution of the deed, and before the marriage, the defendant was informed by Mrs. Morgan, that she had executed the conveyance, and was fully apprised of its contents. Upon his remonstrating against the arrangement, she said that she had not received the nominal consideration of one dollar mentioned in the deed, and told him that she would not receive it; and he and she were both of opinion that unless it were paid, the deed would not be effectual. Here then is a case in which the husband was fully and truly apprised of what had been done. And if this were a bill by the husband to set aside this disposition of the property as fraudulent against him, we would, upon the authority of the cases on this subject, be constrained to refuse him relief, even without inquiring whether the object of the conveyance be meritorious, and without laying stress upon the situation of the husband in point of pecuniary means.

It is still more clear that we should grant the relief in this bill prayed for. The complainant has the legal title to the negroes in question by virtue of the conveyance; the wife of the defendant has the equitable title for life, and to say nothing of the question of emancipation, the sale and conveying away of the negroes would be destructive of the equitable title of the wife, who is not even a party to these proceedings.

The decree therefore of the chancellor will be reversed, and the defendant will be enjoined from selling or disposing of the negroes.

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v.
Black.

SMART *vs.* KING, *et al.*

CHANCERY. *Legacies—who takes.* The residuary clause—"all the rest of my estate real and personal, to be equally divided between my grandchildren," includes a posthumous grandchild, who was *in ventre matris* at the testor's death. 1 Roper on Legacies, c 2, § 1, subsection 3.

On the 15th of June, 1835, Samuel Todd of Knox county, made and published his last will and testament, of which he made Eli King and Charles B. Hodges executors. After certain specific bequests, there was the following residuary clause—"All the rest of my estate real and personal to be equally divided amongst my grand children."

At the time of the testator's death his daughter Martha Smart was pregnant, and five months and five days afterwards, was delivered of a son, Thomas B. Smart, the complainant. The testator had eight grand children born at the time of his death; and the executors being advised by counsel, that none of his grandchildren except those in existence at the time of his death could inherit his estate, proceeded to divide it among the eight in exclusion of the complainant.

His father as his next friend on the 28th of March, 1836, filed this bill in his name, in the chancery court at Knoxville, against the executors and the other grand children, praying the court to put a construction upon the will for the guidance of the executors, and to determine the rights of the parties; to enjoin any further disposition of the property; that the partition already made be annulled, and another partition made, giving the complainant an equal share of the testator's estate with the other grand children; for an account and general relief.

The executors answered, the guardians of some of the grand children demurred, and the bill was taken for confessed as to the rest.

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v.
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The cause was heard on the 11th of October, 1837, by Chancellor BRAMLITT, who, being of opinion that the complainant was not entitled to any relief in the premises, dismissed the bill; and the complainant appealed in error.

GEORGE S. YERGER, for complainant said, 1—By the old rule, in construing a devise to children generally, regard was had to the time of making the will, and children then alive were only considered capable of taking. Hence many of the old cases and *dicta* of the judges excluded a child born within nine months after the death of the testator, Fonblq. 584; 1 P. Wm. 342; Prec. in Chancery, 470; 1 Ves. Sen. 114, note.

But the court have long since settled, that a devise generally to a class as "children," no period being fixed for the legacy to vest, vests and takes effect at the death of the testator. 2 Atkins, 122, note; 5 Binney, 607.

From this rule it follows, that all who come within the description of children, and are in law capable of taking at that time, are let in, and of course children in *ventre sa mere*, because they are for all these purposes considered as being children, and capable of taking.

The distinction taken in 1 P. W. 342, that a devise generally to children, applied only to such as were living at the time of the making of the will, and not at the death, has been overthrown by all the modern cases; for it is now settled, that the legacy vests, not in the children in existence at the making of the will, but those who were in existence at the death. 2 Atkins. 122, note, and cases cited; 2 Wms. on Executor, 717; 5 Binney, 707; Ward on Legacies, 123.

It follows, therefore, that all living, or in existence at the death, must take. The question then, and the only question is, whether a child, in *ventre sa mere*, is considered as living, or in existence. If it is, the complainant is entitled. Fonblq. 586, note; 2 Atkins, 117; 2 Ves. Jr. *Clark vs. Blake*, 673; 2 Hen. Blk. Rep. 399, *Doe vs. Clarke*; *Lancaster vs. Lancaster*, 5 T. Rep. 49; 1 Murphy's Rep. 250; *Swift vs. Duffield*, 5 Ser. & Rawle, 38; *Trower vs. Butt*, 1 Sim. & St. 90; 1 Chitty's Blackstone, 130, in note.

2. But supposing the old rule to prevail, as in 1 P. Wms. 342, that it should only refer to such children as "were living at the making of the will," still we must recover, for all the cases agree, that a devise to children "living" at the death of A, includes a child *in ventra sa mere*, because it is living, and in existence at that time, although not born. Now if the rule is, that in a devise to children, none shall take but such as were living at the date of the will, it follows, that if the child be *in ventre sa mere* at that time, it is a living child, and consequently takes. The case in 1 P. Wms. 342 decides this.

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R. J. McKINNEY, for the defendant said, the single question in this cause is, whether under a bequest to grand children a child *in ventre* at the death of the testator will be let in to take under the will? and in support of the negative cited 4 Bac. Abr. Legacy, 341; 2 Fonb. Eq. book 4. pt. 1, § 13, 14, and cases there cited.

He said the construction is to be made as matters stood at the time of making the will. To that time reference is to be had in order to ascertain the objects of the testator's bounty. "Where a sum of money is given generally, to be equally divided among the children of A, those only who are living at the death of the testator shall take. The reason is, that it was the intention of the testator that the legacy should then vest, and that the legatees should then receive their money." 2 Fonb. Eq. loc. cit. § 13, and note. It would be otherwise when it was the apparent intention that the legacies should not vest till a future time—all who were born before that time would be let in.

That a child *in ventre* shall not be let in, he cited also 1 P. Will. Rep. 341, and cases cited in note 2; 2 Atkins, (Saunders's Ed.) 122, where the cases are collected and classed; 2 Bro; C. Rep. 38; 1 Cox R. 248; Ambler's Rep. 708.

TURLEY, J. delivered the opinion of the court.

Samuel Todd made and published his last will, in which is June 21.
the following residuary devise. "All the rest of my estate real and personal, to be equally divided between my grand

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children." The complainant is one of his grand children, who was not born at the time of the testator's death, but was *in ventre sa mere*, and the question is, whether under these circumstances, he is entitled to his equal portion of the bequest of his grandfather?

Whatever may have been the earlier decisions on this point, it would seem that there is not at present any doubt that the complainant is entitled to the relief sought. In the case of *Trower vs. Bulls*, reported in Simon & Stewart, 181, and in 1 Cond. Eng. Ch. Rep. 90, the vice-chancellor in commenting on this subject observes—"It is now fully settled that a child *in ventre sa mere* is within the intention of a gift to children living at the death of a testator; not because such child can strictly be considered as answering the description of a child living, but because the potential existence of such a child places it plainly within the reason and motives of the gift."

It is said in note 2, to *Heath vs. Heath*, 2 Atkyns, 121, 122, "that the general rule in cases of this nature seems to be, that when the devise or gift to the children is general and not limited to a particular period, then it is confined to the death of the testator; and that under a devise to children living at the testator's death, a child *in ventre sa mere* shall take;" and the editor cites Pr. Ch. 470; 2 Ves. 83; Ambler, 348; 1 Bro. Ch. Rep. 532; 2 Bro. Ch. Rep. 352; Pr. Cha. 50; 1 P. W., 345; 1 Ves. 85; 2 Bro. Ch. Rep. 320.

In the case of *Swift vs. The Executors of Swift*, 5 Ser. & Rawle, 38, the supreme court of Pennsylvania have determined, "that a posthumous grandchild, *in ventre sa mere*, at the time of making the will and death of the testator, is entitled to a grandchild's share, under a devise and bequest to the testator's grand children, the children of his deceased son Edward, of all the residue and remainder of his estate, both real and personal;" and this is, as Judge Duncan in that case says, "according to the dictates of common sense "and humanity;" for a child "*in ventre sa mere*, for all purposes for his benefit, is considered as absolutely born; he takes by descent, and by distribution, is entitled to the benefit of a

charge for securing portions for children, may be an executor, may have a guardian assigned, in executory devises is a life in being, and may be vouched in a common recovery." The authority and reasoning of the cases referred to are satisfactory to this court.

The judgment of the court below will therefore be reversed and a decree rendered for the complainant in conformity with the prayer of his bill.

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v.
King.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1833.

DONELSON vs. YOUNG & CLEMENTS.

CHANCERY. *Fraud in sale of a chattel by false affirmation.* A machinist, in selling a worthless machine for a good one, is guilty of fraud, whether aware or ignorant of the defect.

SAME. *How the buyer is protected.* In such case, equity will enjoin the seller from collecting a negotiable security, executed for the price of the machine, and compel him to account for any part of the purchase money, paid to him or his *bona fide* assignee. See 1 M. & S. 525, 526, 527.

SAME. *Assignee.* But an assignee of such security without notice, express or implied, of the fraud, will not be enjoined from collecting it.

Clements, who was a machinist, sold to Donelson a spinning machine for one hundred dollars, for which Donelson executed his bill single, dated September 18, 1831, payable on or before the first of June, 1833. The machine proved to be nearly useless, and on being informed of the fact, he acknowledged that he had sold it for a good one, and said that he would make it good. In attempting to repair, he broke it, and he then directed it to be sent to his shop, where he made repairs and alterations but without bettering the machine. On the 25th of May, 1833, he assigned Do-

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v
Clements.

Donelson's bill to Young, who it seems had no notice of the failure of the consideration. He sued Donelson in the county court of Overton, and on the 5th of August, 1834, recovered judgment for one hundred and seven dollars. To injoin this judgment Donelson filed his bill in chancery, on the 11th of September, 1834, stating the sale of the machine by Clements as a good one; that it had proved nearly worthless; that he had assigned the bill to Young, but only colorably, to avoid the equitable defence resulting from the failure of the consideration, and praying an injunction, &c.

The answers denied the charge that the bill had been assigned colorably, and alledged that it had been done fairly, for a valuable consideration, before its maturity, and without notice to Young of the failure of the consideration. And Clements' answer besides set up a specific defence, which is not stated because no proof was adduced tending to establish it.

His Honor the Chancellor dismissed the bill as to Young, and ordered an account of the bond and interest, with which he directed Clements to be charged, and of the value of the machine, with which he was to be credited. From this decree Clements appealed in error.

December 3.

S. TURNER, for the complainant, insisted, that the pleadings made a clear case of misrepresentation, resulting in injury to the trusting party, of which the court had undoubted jurisdiction.

A. CULLOM, for the defendants, argued that the complainant's remedy was at law upon the special contract stated in the answer of Clements, which contract he insisted was free from fraud or any manner of misrepresentation. Hence there was no ground for the interference of a court of equity, which has no power to enjoin purchase money unless there is fraud and misrepresentation, to which point he cited 4 Yerger, 98, *Shenault vs. Katon*. He said that the decree, in reciting the facts upon which it professes to be based, makes out a case of warranty, and recites the fact which sustains the jurisdiction; and he insisted that it was therefore erroneous; 10 Yerger, 41, *Burdine vs. Shelton*.

TURNER in reply, said that the special contract stated in

Clements' answer had not been sustained by any proof; and therefore the case stood upon the facts stated in the bill, which had been fully made out in evidence.

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GREEN, J. delivered the opinion of the court.

It is very clear in this case, that the machine, purchased December 5. by the complainant from the defendant Clements was wholly worthless. The bill charges that Clements represented that the machine was a good one, and thus imposed upon the complainant. This allegation is supported by the proof. Thurstey Smith says, she heard Clements admit that he had sold the machine for a good one. Where a party misrepresents a material fact, by which another is misled or imposed upon to obtain an undue advantage of him, it is fraud. Story's Eq. § 192.

In this case Clements was the manufacturer of the article sold. It was radically defective, so as to be of no value. If he is a good mechanic, capable of making a good machine, he must have known, that the one sold by him to the complainant was not a good one, and by his representation intended to mislead him. If he is, not a master workman, he must be sensible of his want of skill and is equally culpable.

In either point of view, he is guilty of fraud, and consequently, this court has jurisdiction to afford relief.

But the other defendant obtained an assignment of the note before it was due, without notice of complainant's equity, therefore, there can be no decree against him.

Let the decree be affirmed in all its parts.

NOTE. The opinion of Buller, J., in *Paisley vs. Freeman*, 3 T. R. 51, 2 Smith's Leading Cases, 46, in the Law Library, seems to establish the following distinction between fraud and deceit.

A false assertion, whether the falsehood was known, or unknown, to the asserter, made in some dealing, and calculated to occasion, and occasioning, injury to another, is a deceit in law. When the falsehood of the assertion is known to the asserter, it is then fraud.

Buller's words are as follows: "I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be—saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive, another person. Every deceit comprehends a lie; but a deceit is more than a lie on account of the view with which it was practised, (namely,) its being coupled with some dealing and (with) the injury which it is calculated to occasion, to another person. * * * Knowledge of the false-

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hood of the thing asserted, constitutes fraud." The distinction between deceit and fraud—*dolus* and *fraus*—seems to be this, deceit is any subtle machination, whether in words or deeds, designed to circumvent. Fraud imports some detriment and damage. Every fraud, therefore, is a deceit, but not the contrary. Forc. Lex. Verb. *Dolus*. Labeo defines deceit, *dolus malus*, to be any subtlety, artifice or machination employed to circumvent, mislead and deceive another. Pothier's Pandects, Book 4, Tit. 3, Art. 1, § 1, subsec. 2.

Whenever a security for money has been obtained by fraud or deceit, a court of equity has jurisdiction to relieve against it; and its being, in any case, a simple contract, only makes it capable of being relieved against in a court of law too, but does not oust the chancery jurisdiction. *Dyer vs. Tynswell*, 2 Vernon, 122, and cases cited in Mr. Raithby's note 2; especially, *Coll vs. Woollaston*, 2 P. W. 154; Chitty on Bills, 119; *Gladstone vs. Hawden*, 1 Maule & Selwyn, 517.

HARRIS vs. MILLER.

WATERCOURSE. *Right of flooding land above.* A right of permanently overflowing the land of another, by a mill dam to be constructed below his line, is a hereditament; and a contract for the sale of it must, therefore, be in writing. Acc. *Bridges vs. Purcell*, 1 Devereaux and Battle, 192.

PARTNERSHIP. *One partner's bill single, effect of on the others liability.* Where a contract of sale, which must, by law, be in writing, is made in writing under seal, with one partner, who gives his bill single for the price of the thing purchased, the other partner cannot be sued upon the consideration.

Harris had prepared certain timbers with which he intended to build a mill on his own spring branch. Miller and one Hayter, having entered into a partnership to erect a mill upon the same watercourse just below the boundary of Harris' land, proposed to purchase the timbers and also the right to back the water upon his land.

A verbal agreement was accordingly made between them, whereby, in consideration that Hayter would confess a judgment before a justice for one hundred dollars in favor of a creditor of Harris, and that Miller would stay it, Harris engaged to sell them the timber and grant them the right to back the water upon his land.

At this point Miller went off on a journey, and left Hayter to go on with the contract. Harris and Hayter drew up and executed, under their seals, a memorandum of the agreement of the following tenor—"It is agreed between Thomas K. Harris and Thomas B. Hayter, that said Harris sells to

said Hayter certain mill timbers, prepared and some raised on his spring branch, for which said Hayter *has paid* one hundred dollars; and said Harris agrees—it being understood that Hayter is to put the mill upon Esq. Miller's land on the same branch—that said Hayter shall have the right to back the water upon his land within twenty yards of the head of his highest spring, witness our hands and seals this 3rd April, 1837.”

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Hayter had already, on the 10th of March, executed his bill single promising to pay Harris' creditor one hundred dollars one day after the date of the bill, and on the 6th of May, he confessed judgment upon it, but the judgment was not stayed by Miller. And the consideration, therefore, not being secured to be paid in the manner provided for in the verbal agreement between the parties, Harris sued Miller in the circuit court of Overton, in *assumpsit*, on the 21st of September, 1838, and declared in four counts upon the verbal agreement, specifying the terms of it in each with slight variations.

The defendant demurred to the declaration, 1. because it showed no debt or demand due from the defendant to the plaintiff, but to the plaintiff's creditor, 2. because the action was founded upon a supposed promise to answer for the debt of another, and no profect was made of any written promise, &c. On argument of this demurrer at June term, 1838, it was sustained as to the second and fourth counts, and overruled as to the other two. To them the defendant pleaded, 1. *non assumpsit*, 2. that he had been ready and willing, and had offered to secure the demand of the plaintiff's creditor in manner and form as the plaintiff in declaring alleged he was bound to do; but said creditor had refused to permit him to do it, or to accept of the same, and this, &c. Issues were joined upon these pleas, and at October term, 1838, they were tried before his Honor, Judge MARCHBANKS, of the 13th circuit and a jury of Overton. The facts submitted to the jury were substantially as above stated.

His Honor charged them in substance, that to entitle the plaintiff to recover, he should have guaranted the privilege of damming the water up his spring branch, to Miller as well

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as to Hayter, and said guaranty to Miller should have been in writing, a parol guaranty of such privilege, being of no validity. The verdict was for the defendant, and the plaintiff appealed in error.

December 3.

A. CULLOM for the plaintiff insisted—1. That a verbal license to dam the water upon the plaintiff's land is valid.

Such a license conveys no interest in land, it only grants a temporary and occasional right to make or cause an erection upon the land, or what is the same thing in principle, to overflow it with water. 7 Taunt. R. 374; 8 East, 308; 5 Moore and Payne, 712; 2 Harrison's Index, 1460; 10 Yerger, 211.

2. That Hayter and Miller made the agreement jointly and were partners in the transaction; and Hayter was authorised by Miller to go on with the contract, and consequently the written agreement executed to Hayter, the partner and agent of Miller, would make Hayter trustee for Miller, and in equity secure to him a resulting trust. Watson on Partnerships, 75; Gow on Partnership, 49.

3. It would not devolve upon Harris, the plaintiff, to prescribe how or to whom the conveyance should be made; the credit was given to both as partners, and he executed writings to Hayter, knowing he was the partner and agent of Miller; and he had a right to suppose that Hayter would have the writing so drawn as to effectuate the objects of the partnership, according to the rights and interests of the partners themselves.

S. TURNER, for the defendant, argued that the right to overflow another man's land is a permanent interest and cannot be sold but in writing, and cited 1 Haywood, 248.

REESE, J. delivered the opinion of the court.

December 6.

Upon the pleadings and proofs in this case, the circuit court charged the jury—1. That a verbal agreement to concede the privilege of permanently overflowing the land of the plaintiff, by a mill dam to be constructed below his line, would not be valid, but would be within the statute of frauds: and 2. That the written agreement between the plaintiff and Hayter, securing to the latter, the privilege in question,

would not authorize the plaintiff to maintain this action against Miller.

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The first proposition has been but slightly contested in argument, and it is well sustained by authority. The grant of such privilege confers a permanent interest in the soil itself, for the use of the mill to be constructed, and must, therefore, be in writing.

But, with regard to the second proposition of the court below, it has been urged, that the court erred, because Hayter, with whom the written agreement was made, was to have been the partner of the defendant in the construction of the mill, and that, therefore, the latter could, in a court of chancery, compel Hayter to transfer to him a moiety of the legal title in the privilege. If the verbal agreement had been valid, it may well be questioned whether the plaintiff, who, in the execution of it, violated its terms so far as to give a written concession of the privilege, not to the defendant and Hayter jointly, but to Hayter alone, should be permitted, in a court of law, to recover from the defendant, the consideration, upon the ground, that the latter could, therefore, protect himself against the wrong done him, by litigating the matter with his partner, and perhaps with the plaintiff, in a court of chancery.

But into that, it is not necessary to enquire,—for we have said that the verbal agreement was not valid. The only agreement, therefore, to which we can look, is the written one between the plaintiff and Hayter, to which the defendant appears, to be an entire stranger. The concession of privilege, under the seal of the plaintiff, is made to Hayter alone; the promise to pay to the plaintiff the consideration is made under the signature and seal of Hayter alone. The written contract, on both sides, under the seals of plaintiff and of Hayter, excludes the defendant from benefit and liability, and he may well say to them both in this action, that the matter was *res, inter alios acta*.

Let the judgment be affirmed.

NOTE. In the English St. of Frauds, the words are lands, tenements or hereditaments, or any interest in or concernig them. The words in italics are omitted in our statute. It is said, in *Evans vs. Roberts*, 12 Eng. Com. L. R. 377, that the words—lands, tenements or hereditaments, are used in the statute to denote a fee simple, and the other words, to denote a chattel interest. The

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cases upon these latter words will be found collected in the text and notes, 2 Starkie's Ev. 6 Am., from the 2d Eng. Ed. 347, 348. Chitty's English Statutes, 370, note (m.)

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2. Easements, being incorporeal rights, can only be created by deed, at common law—2 Bl. Comm. 317; 4 Kent's Comm. 190, 3 *Id* 452, 453—and, being besides hereditaments, come within the words of the St. of Frauds. *Fentiman vs. Smith*, 4 East, 107; *Thompson vs. Gregory*, 4 Johnson, 41; *Cook vs. Stearns*, 11 Mass. R. 533; *Bridges vs. Purcell*, 1 Devereaux and Battle, 492, in which case, Judge GASTON, in a very satisfactory manner, collects and examines the leading cases, on the doctrine involved in the first pl. of this case.

For the nature of a mere water right, see Angell's ~~very valuable~~ Treatise on the Law of Water Courses, C. 2 § 4. For the mode of conveying such right, same chapter, § 5. For the right of backwater and flowage, as depending upon grant, C. 4, § 3; and Gibbons on Dilapidations and Nuisances, c 10, § 12. And see *ante* *Neal and Shelton vs. Henry*, p. 17. In the note to this case, *ante* p. 22, it is stated that it is an authority that *merely overflowing* the plaintiff's land is an actionable injury. On which point, see Gibbons on Dilapidations and Nuisances, c 10, § 9, 10, 11 and authorities referred to. The case of *Williams vs. Morland*, 9 Barnwell and Creswell, 910;—9 Eng. Com. Law, R. 269, decides, that causing the water to flow against the plaintiff's banks more impetuously than it would naturally have done, so as to injure them, is actionable. But the plaintiff must, in such case, alledge and prove *actual* injury. It will not do simply to show that by the defendant's act the water flows more impetuously than it would naturally have done. So, in *Wright vs. Howard*, 1 Sim. and Stew. 190,—1 Eng. Cond. Ch. R. 95, the Vice Chancellor, Sir John Leach, is reported to have said—"It appears to me that no action will lie for diverting or throwing back water, except by a person, who sustains an *actual* injury." See the book last cited, page 102. *Merely throwing the water back*, he thought not actionable. It must cause the plaintiff an injury, as by impairing the value of his land. It is difficult, however, to suppose a case where flooding one's land would not be injurious.

[REPORTER.]

TROTTE vs. WEST, MOSS & Co.

ADMINISTRATOR AND EXECUTOR. *Construction of 1789, c 23, § 4, 2d proviso.*

If an administrator pay part of a debt of the intestate, and "promise to pay the balance soon," that does not amount to a *special request* to delay bringing suit so as to stop the operation of the statute of limitations during the time of the delay.

BILL OF EXCEPTIONS. *Defective statement of evidence.* If it does not appear in the bill of exceptions that all the evidence submitted to the jury is stated therein, the court of errors will presume that there was evidence to justify the verdict of the jury. This presumption will not be made if the bill state that it contains all the *material evidence*.

PLEADING. *Immaterial issue.* If an immaterial issue be submitted to a jury, and they render a verdict thereupon, final judgment cannot be pronounced upon the finding; but only a judgment of repleader.

PRACTICE. *New trial.* If the facts submitted to a jury do not sustain the verdict, it will be set aside and a new trial granted; and the act of 1801, c 6, § 59, which says that not more than two new trials shall be granted to the same party, does not prevent the court from granting new trials,—for error in the charge of the court to the jury, for error in the admission or rejection of testimony, for misconduct of the jury, and the like.

SAME. *Certiorari on diminution.* *Certiorari* awarded on diminution suggested after judgment entered in the supreme court, the suggestion being supported by a copy of the record from the court below showing the diminution.

Henry Wiley executed his bill single to the defendants in error on the 14th of April, 1831, for twelve hundred and fifty-three dollars and seventeen cents, payable four months after date, in the branch of the Bank of the United States at Nashville. He died soon afterwards, and administration of his estate was granted to the plaintiff in error by the county court of Warren, on the 4th of July, 1831. On the 6th of May, 1833, the plaintiff in error paid John P. Erwin, who had the bill in his possession, as agent or trustee, three hundred and eighty one dollars and fifty cents, which sum was indorsed as a credit, at that date, upon the bill; and the plaintiff in error then promised Erwin "to pay the balance due soon." On the 20th of December, 1833, the defendants in error sued the plaintiff in error in the county court of Warren, in debt upon this bill. The declaration was in the usual form. The defendant pleaded, 1—That the plaintiffs were residents in the State of Tennessee at the time of Wiley's death, and they did not demand, and bring suit for the recovery of their debt within two years next before the

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issuance of the original writ in this cause from the time of the defendant's qualifying as administrator. 2—That they did not demand and bring suit for the recovery of the debt within three years, &c. 3—Fully administered. 4—Payment by the administrator.

The plaintiffs replied to the first plea, that they within two years after the qualification of the defendant as administrator, to wit, on the 6th day of May, 1833, demanded payment of him, and he then paid the sum of three hundred and eighty one dollars and fifty cents thereof, and promised the plaintiffs the balance of their debt in a short time, and requested them not to bring suit against him for the recovery of the balance: and therefore they say they did make demand of their debt within two years after the defendant's qualification as administrator; and that they did at the defendant's special request delay bringing suit against him for the recovery of their debt for a short time, to wit, from the 6th of May, to the 20th of December, 1833, and this, &c. To the second plea they replied, that they did demand their debt and sue for it within three years, &c. To the third, that the defendant had not fully administered in the usual form. And to the fourth, that the defendant had not paid, &c. A rejoinder was filed to the first replication and issue was thereupon joined. The other replications concluded to the county, and *similiters* were filed to them. The cause was tried in the county court at July term, 1834, and the plaintiffs recovered a verdict and had judgment. The defendant appealed to the circuit court of Warren. There at May term, 1836, it was again tried, and the jury found the verdict of the jury in the county to be correct, and the plaintiffs had judgment of their debt and twelve and a half per cent. per annum according to the act of 1794, c 1, § 64. The circuit court set this verdict aside, and granted a new trial. At September term, the defendant was allowed to file two additional pleas. 1—That the defendant was appointed and qualified as administrator of Henry Wiley on the 4th of July, 1831, by the county court of Warren, where Wiley resided at the time of his death; and that the plaintiffs who resided within the state failed to demand and bring suit

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for their debt for more than two years after their right of action accrued, and this, &c. 2—That the plaintiffs being residents within this state did not make demand and bring suit for their debt within two years, the time limited by the act of 1789, c 23, § 4, and this, &c. The plaintiffs filed one replication to both pleas—That their debt did not become due until the 17th of August, 1831; that within two years from that time, to wit, on the 5th of May, 1833, they demanded payment of their debt from the defendant, when he paid the sum of three hundred and eighty-one dollars and fifty cents, part thereof, and specially requested them to delay bringing suit for the balance for a short time; wherefore they say that within two years from the time their debts became due, they did demand payment thereof, and thereupon, at the special request of the defendant, they did delay to bring suit against him for the balance for a short time, to wit, from the 6th of May to the 20th of December, 1833, and this, &c. The defendant rejoined, that he did not specially request the plaintiffs to delay bringing their suit for a short time, nor did he request them to delay from the 6th of May to the 20th of December, 1833, and of this, &c. The plaintiff filed a *similiter*. The cause was then again submitted to a jury, who found the same verdict as the former jury had done, and the court gave judgment against the defendant for \$1,363 50 cents debt and damages.

In charging the jury, his Honor Judge CARUTHERS, said “that if they should find that if the plaintiff delayed to sue as stated in the replication to the defendant’s plea of the statute of limitations, at his request, they would find for the plaintiff; that a promise on the 6th of May, when a part was paid to pay the balance soon, is equivalent to a promise to wait a short time; and if in consequence of that promise, they did wait a short time, to wit, from thence till December, when suit was brought, the issue is for the plaintiffs.” For supposed error in this charge, the defendant appealed to the supreme court, by whom the judgment was reversed and remanded at December term, 1836, as reported in 9 Yerger, 433.

In the circuit court, at May term, 1837, the cause was

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again submitted to a jury upon the same evidence as on the former trials; and the court instructed the jury in conformity with the opinion of the supreme court as reported in 9 Yerger. They found a verdict for the plaintiffs. The defendant moved for a new trial, which being refused, he filed a bill of exceptions which sets out the evidence, and concludes with the words—"this was all the *material* evidence in the cause," and appealed in error. These words standing alone in a separate sentence at the end of the bill of exceptions, were omitted by the clerk in the record sent up to December term, 1837, of the supreme court; and the cause was submitted to the court upon the record thus defective, and after argument by MEIGS, for the plaintiff in error, and JAMES CAMPBELL, for the defendants in error, the court affirmed the judgment, and assigned their reasons for the affirmance in the following

Opinion delivered by GREEN, J.

In this case, the trial was had at the May term, 1836, of Warren circuit court, and a verdict was had for the defendants in error, who were plaintiffs below, which was set aside by the court and a new trial awarded. At the succeeding term of the court, the cause was again tried, and the plaintiff obtained a verdict, which the court refused to set aside, but gave judgment thereon, from which judgment an appeal was prosecuted to this court. At the last term, this court reversed the judgment of the circuit court, for misdirection of the jury as to the law of the case, and remanded the cause for another trial. At the last May term of said circuit court, the cause was again tried and a verdict was rendered for the plaintiff, which the court refused to set aside, and this appeal is prosecuted.

The counsel for the defendants in error insist, that as there has already been two new trials in the cause, the court is forbidden by the act of 1801, c 6, § 59, to grant another. The act says, "That not more than two new trials shall be granted to the same party." This means, that where the facts of the case have been fairly left to the jury upon a pro-

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per charge of the court, and they have twice found a verdict for the same party, each of which having been set aside by the court; if the same party obtain another verdict in like manner, it shall not be disturbed. But this act did not intend to prevent the court's granting new trials, for error in the charge of the court to the jury, for error in the admission or rejection of testimony, for misconduct of the jury, and the like. This, we should consider the proper construction of the act, if we were now for the first time called upon to expound it; and such having been the uniform practice of the court since its passage, we are the better satisfied with this view of it. Taking the interpretation of the act here given to be the true one, it will be seen that its provisions are not in the way of this court granting the new trial now asked for. There have been but two trials heretofore, granted to the same party in this cause, and one of them having been awarded by this court, for the misdirection of the jury, by the circuit court, we would be at liberty to grant a new trial again in the cause.

2. But defendants in error insist, that there is no evidence in this record, that all the proof is set out in the bill of exceptions, and consequently we are to presume that there was evidence to justify the verdict. The court concurs with the counsel in this view of the case. There is certainly nothing in the peculiar nature of the question in issue, and the proof by which it must have been supported, to indicate satisfactorily that all the evidence is set out in the record. Nor is there any expression used evincing that all the proof was contained in the bill of exceptions. The rule therefore is, as contended for by defendant's counsel, that the court, in such case, will presume there was testimony to warrant the verdict.

Let the judgment be affirmed.

After this opinion had been delivered, and the judgment of affirmance entered, the counsel for the plaintiff in error procured a copy of the record from the clerk of the circuit court, containing the words—"this was all the material evidence in the cause"—and thereupon suggested a diminution

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and moved the court for a *certiorari* to bring up a more complete record, which was granted. On the return of the *certiorari*, at this term, the case was argued by

December 5.

MEIGS, for the plaintiff in error.

JAMES CAMPBELL, for the defendants in error. He cited *Gillespie vs. Davis and Wife*, 5 Yer. Rep. 319, and *Thompson, vs. French*, 10 Yer. Rep. 457.

December 6.

TURLEY, J., delivered the opinion of the court.

This case was before the court at the December term, 1836, when it was held that a payment of part of a debt, and a promise to discharge the balance soon, was not a sufficient request to delay suit, to prevent the operation of the statute of limitations of two years, passed for the protection of the estates of deceased persons in the hands of executors and administrators.

Then the judge of the court below had given the jury erroneous instructions upon this point, and the judgment was reversed, and the case remanded for a new trial. As it is now presented, the charge of the circuit judge is correct, but the facts are the same, and we are now called upon to say, whether they are sufficient to support the verdict and judgment.

We are of opinion that they are not. The only proof is that of John P. Erwin, which shows that upon a demand made, the administrator paid a part of the debt and promised to pay the balance due soon. This, as has been seen, the court has heretofore determined will not stop the operation of the statute of limitations; if it will not do so, then there is no evidence whatever upon which the jury could, under the charge of the court, have legally returned the verdict, upon which the judgment was given, and it ought to have been set aside, and a new trial granted.

But it is said, that the bill of exceptions does not show that there was no other testimony, and that the court must therefore infer that there was other and sufficient evidence to warrant the verdict.

The bill of exceptions shows that this was all the material testimony in the cause, which is equivalent to saying—"there

was no other," or—"this was all the testimony in the cause;" for if the testimony be not material, it is illegal and ought not to have been received, or if received, ought to have been withdrawn from the jury; and as to the question of materiality or immateriality, the court below was the proper judge, and its judgment is conclusive, as there is no bill of exceptions stating the proof, deemed to be immaterial, from which this court can determine whether that judgment were correct or erroneous.

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But it is further said, that the evidence of Erwin clearly proves the fact in issue by the pleadings. If the pleadings, put in issue only the fact as to whether the defendant paid a part of the debt and promised to pay the balance soon, then is the issue immaterial, and no judgment ought to have been pronounced upon the finding, but a repleader should have been awarded. If they put in issue the fact, as to whether the defendant requested the plaintiff to delay his suit, then the proof does not sustain the verdict and a new trial ought to have been granted.

The judgment of the court below is therefore erroneous and must be reversed and the case remanded for further proceedings.

SCANLAND vs. SETTLE, et. al.

PRINCIPAL AND SURETY. *Discharge of surety—substitution—Debtor and Creditor.* If a creditor take a deed of trust on his principal debtor's property, not stipulating to grant the debtor any delay, the taking of such additional security does not discharge the surety. But if the surety pay the money he is entitled to be substituted in the creditor's place to the additional security. The surety will be discharged if the creditor has put it out of his power to make an assignment of the subsidiary security. Story's Eq. § 502.

John Burris, jr. being indebted on account to Settle, Whit-
ley and Smith, merchants and partners in trade, in the sum
of two hundred and five dollars, thirty seven and a half cents,
to secure the payment thereof, executed three several prom-
issory notes with the complainant's intestate, William Locke,
as surety, dated December 21, 1822, payable one day

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after date. Besides those notes he owed the defendants several other sums of money. To secure the whole, on the 7th of April, 1827, he executed a deed, conveying certain real and personal property to a trustee, not stipulating for any delay. But the trustee never acted; the property remained in the hands of Burris, and he disposed of some portions of it. Locke died in 1833, and early in 1834, the defendants sued the complainant, his administrator, in Jackson county court, and at August session, 1834, recovered judgment for three hundred and forty-four dollars and six cents debt and damages besides costs. To enjoin this judgment, the complainant, on the 3d of November, 1834, filed his bill in Jackson circuit court, afterwards transferred to the chancery court at Livingston, charging that the property mentioned in the deed was an ample indemnity and security for the demand of the defendants against Burris, that the deed had been taken to indemnify Locke, and discharge him from liability, and that such was its legal effect; that the defendants had collusively permitted Burris to dispose of, and enjoy the property mentioned in the deed, but that there yet remained a sufficient amount of it subject to the control of the trustee and the defendants to pay and discharge the judgment and costs: praying for a perpetual injunction against the judgment, and in case that should be refused, that the court would cause the trust to be executed, and the property mentioned in the deed, or such part of it as remained undisposed of, and subject to the control of the defendants, to be sold, and the proceeds applied to the discharge of the judgment, and for general relief.

The answer of Settle, the acting partner of the defendant's firm, admitted that the trustee had not acted; that Burris had retained the property, and had disposed of some part of it, but without any collusion on part of defendants, who had been merely passive. The other answers were to the same purpose. The injunction was dissolved and the money collected from the complainant.

On the hearing, on the 5th of January, 1837, before Chancellor WILLIAMS, he ordered the injunction to be made perpetual; that the defendants should repay complainant the

amount collected of him, and also the costs. The defendants appealed in error.

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The cause was heard in the Supreme Court at December term, 1837, when the court reversed his Honor's decree so far as it released Locke's estate and pronounced a decree that complainant should be substituted, in consideration of the money paid by him as Locke's representative, to the rights of Settle, Whitley and Smith, and that the land in the deed of trust mentioned should be sold to satisfy the same. The land was accordingly sold, and the commissioner's report was read and confirmed at December term, 1838.

F. B. FOGG for complainant.

A. CULLOM and CAMPBELL for defendants.

GREEN, J. delivered the opinion of the court.

The bill in this case alleges, that one Burris being indebted to the defendants in the sum of about \$208, he executed to them his bonds, with Locke, the complainant's intestate, as his surety. In 1827, the defendants took a deed of trust from Burris, for a tract of land, a negro, and all his personal property, to secure the payment of certain debts therein specified as due them, including the debts for which Locke was surety. Defendants permitted Burris to retain possession of, use, and waste the personal property mentioned in the deed of trust; and in 1833 having died intestate, suits were brought against the complainant, his administrator, and judgments obtained. The bill charges, that, "there is a sufficient portion of the property named in said deed of trust, now in the county, subject to the control of, and sale, by the said Settle, Whitley and Smith, and the said Thomas Smith, trustee, to pay, and satisfy said judgment and costs."

Dec. 1837.

The complainant prays, that the estate of Locke be released from liability, and the defendants be compelled to resort to their deed of trust to make their debt.

The Chancellor decreed in favor of the complainant, and enjoined the judgment against him,—from which the defendants prosecute this appeal.

We are unable to find any authority, upon which this decree, can be supported. The Chancellor seems to have placed his

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decree upon the ground, that the defendants by taking the deed of trust, including *all* the property of Burris,—placed Locke, the surety, in a worse situation, than he would have been in, had the deed not been made. But this, we think, is a mistaken view of the subject.

The deed, does not stipulate for any delay to sue on the notes, nor is it a legal consequence that there should *be* any delay. So that the facts do not justify us to put the case upon the ground, of a stipulation for delay, upon a good consideration, without the knowledge, or assent of the surety, whereby he would be discharged. Nor can the mere fact, that the deed was taken as an additional security for the debt, discharge the surety. It is true, that the surety on paying the money, would be entitled to be substituted to the rights of the creditor, and to have the benefit of the deed of trust. 1 Story's Eq. § 502. But this very right of substitution, shows that the surety is not discharged; for if discharged, there would be no need of the substitution. So far from the fact, of a creditor taking a deed of trust, or mortgage, from the principal debtor as an additional security, being prejudicial to the surety, it is for his benefit,—it is for *his* indemnity, as though he had taken it himself. Having paid the money, he can avail himself of it, as though it had been executed to him, as an indemnity for his suretiship. It is unreasonable, therefore, that an act, no way injurious, but highly beneficial to the surety, should operate to release him from his liability to the creditor.

But it is said, that where a creditor takes collateral security, and by any act of his own, puts it out of his power to make an assignment of such security, to the surety, who may have paid the debt—such surety would be discharged. 1 Story's Eq. § 502. This is certainly true, but the principle does not apply to this case. It is true, that part of the property conveyed in the deed, was used, and disposed of, by Burris, and if the whole security had been lost, through the negligence or misconduct of the defendant, it would have formed a ground of relief under this head. But the bill, answers and proof, all concur in showing, that the land, which ~~is~~ still liable to this debt, is sufficient to satisfy it. Surely

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then, if there remain of the security a sufficiency, ample to indemnify the surety, he has no right to complain that part of it has been wasted. Indemnity, is all he would have been entitled to, at any rate, and if he obtains *that*, (as he alleges in his bill, may be done,) his situation is as good, as though none of it had been wasted. There is, therefore, no equity against the judgments at law, in favor of the defendants and the decree must be reversed.

But as all the parties are before the court, and it appearing, that the amount of the judgments at law, against the complainant, was discharged, on the dissolution of the injunction in this cause, we are of opinion, that complainant may be substituted to the rights of the defendants, Settle, Whitley and Smith, and that the land in the deed of trust mentioned, be sold to satisfy the amount paid by complainant on account of Locke's suretiship and the costs of this suit.

Judgment reversed.

NOTE. The following is a translation of the texts of the Civil Law in the order which they occupy in Pothier's Pandects, Book 46, Tit. 1, Sec. 5, part of Art. 1 and Art. 2, on the subject of the surety's right of *Substitution*.

According to a very ancient rule of law, a surety or guarantor or other accessory to the obligation of another, could not be made liable, until the property of the principal had been exhausted. This rule has always prevailed in revenue causes, and in cases of the demands of Cities against their magistrates, but in private causes, it had been changed long before the time of Justinian, principally by the authority of Papinian, on account of the delay which the practice produced.

Coeval with the change was the usage of compelling the creditor to sell his claim upon the other debtors to the surety who offered to pay the whole demand. Hence it is stated in the Digest to have been decided by Julian, that if upon my guaranty you trust Titius, and you sue me thereupon, Titius will not be thereby discharged, nor I made liable but on condition that you make good to me your actions against him. Nor is the creditor held to transfer his action against the principal debtor only, but also all the accessories thereof; for example, his actions against the other sureties and his pledges. Hence, in the code, a decision of Dioclesian and Maximian is stated, that as a creditor may elect to proceed against the sureties of his debtor, he cannot compel them to payment without transferring to them, if demanded, his mortgages and pledges. In like manner Severus and Antonine, are reported to have decided, that though a creditor, who has taken a pledge and a surety for the same debt, may, if he like, compel the surety to pay; yet if he do, he must transfer the pledges to him, unless taken to secure the payment of more than one debt,—in which case, he is not obliged to transfer them until he is fully satisfied.

The treasury itself is not excepted from this rule. For although it could always have been compelled to exhaust the property of its debtor before resorting to the surety, yet, it is bound, like other creditors, to cede its actions. Hence, Paul, as quoted in the Pandects, says that if one who is bound for another's

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debt to the treasury, be sued and pay it, he may justly demand all fiscal extents, distresses and remedies against the debtor's goods, including the aid of the Official. Accordingly, Valerian and Gallienus decided, as appears in the Code, that where fiscal remedies have been assigned and transferred, by competent authority, to a surety who has paid the demands of the treasury against its debtor, the assignees cannot be disquieted in the title of the property which he thereby acquires, by those creditors of the public debtor over whom the treasury had a priority.

We have said that a creditor, to whom a surety has paid his demand, is bound to assign to him his actions. The question arises—how can this be done? For it may be said, when the creditor has received his money from a surety, this, being a satisfaction of the debt, tolls his actions. Not so, says Paul, as cited in the code, for the money paid by the surety is not received by the creditor in *décharge* of the debt, but, in a manner, as the consideration of a *sale* of the debt to the surety. And the transaction neither extinguishes the debt nor tolls the actions, but both pass to the surety as a consideration of the payment. It is to be observed, nevertheless, that the same lawyer held, that a surety, to whom pledges given by co-sureties have been transferred, does not stand in the place of a purchaser of pledges become absolute and irredeemable, but in the place of him who first received them, and therefore may be made to account for interest and profits.

A creditor is barred of his recovery against a surety, not only if he will not assign to him his remedies against the principal debtor and the co-sureties,—but also, if by his fault, it happen that he has it not in his power to assign them. Hence Papinian is reported in the Pandects as holding, that if a creditor sue his principal debtor, and mismanage his suit, whereby it is lost, he cannot recover of the guarantor in an action upon the collateral undertaking, since by his own fault, it has happened that he cannot assign his actions. But according to a decision of Julian, reported also in the Pandects, if one of two sureties who are bound for twenty dollars, give or promise the creditor five in discharge of his liability, that will not discharge the other surety; and if the latter be sued for fifteen he cannot plead any plea in bar of the action, and consequently not the plea, that the creditor cannot assign him his action against the co-surety, for the creditor has lost the power of making the assignment, not by his fault but by an act of bounty, which is not culpable. But if the creditor undertake to recover the remaining five dollars from the first surety, the plea of deceit will bar the action. *Austen vs. Howard*, 1 J. B. Moore, 68; 7 Taunt. 327; Theobald on Suretyship, 288; *Collins vs. Prosser*, 3 Dowling and Ryland, 112; same case, 1 Barnwell and Cresswell, 682; Theobald, § 151. Theobald, page 288, states that this point has not been decided in England.

There is this peculiarity in the plea whereby the cession of actions is demanded, that it may be pleaded after sentence, because it does not impugn or infringe, but only modify, the matter adjudged. Hence, in the Digest, Modestinus is stated to have said, that if judgment for the whole debt be rendered against one guarantor, whenever he is sued upon that judgment, he may demand a transfer to himself of the creditor's actions against all who guarantied the same thing.

But the cession of actions does not take effect by operation of law; but only if the surety *when* he pays, sees that they are ceded to him. Otherwise, he will be left to his own proper actions against his principal,—as to the action upon the guaranty, or for money paid, or work and labor done, &c. Upon this point, Gordian is reported in the Code to have decided, that an action on a guaranty being a personal action, that is, one in which the plaintiff alleges that the defendant is bound to give or do something for his benefit according to the nature of the case, if it be brought in the name of the surety against the principal

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debtor or his heirs, the President of the province will give that specific relief which he may find to be proper. For example, he will adjudge to the surety the specific pledges given by the principal, if the payment were made with a view to purchase those securities; and he will even decree a transfer of actions. Moreover, in order to secure the pledges, he will exert his extraordinary jurisdiction against those who may have them in possession.

It remains to be observed that the assignment of actions ought to take effect at, and not after an unconditional payment. And to this purpose it is reported in the Pandects, that Modestinus held in a case of guardian and ward, that if the guardian's surety made unconditional payment of all that was due, such payment would toll the actions, and a subsequent assignment of them would be ineffectual. But if before the payment, or when the surety is sued, he provide for the assignment, and then make payment, and the assignment follow, the actions are saved. For in this last case, the money paid is the *price* of the ceded actions rather than a satisfaction of the actual suit against the surety.

What has been said as to the assignment of actions to which guarantors and sureties are entitled, is equally applicable to co-debtors.

But this benefit does not extend to one who without being himself obliged pays the debt of a stranger. Thus, Gordian in the Code is stated to have decided, that no action lies upon the ground of a failure to cede actions, against a creditor in favor of a stranger, who pays the debt for the purpose of having the debtor's obligation transferred to him; and this though the payment be made in the name of the debtor, and though it extinguish the obligation. In *The Bank of the U. S. vs. Winston's Executors*, 2 Brockenborough, 252, a quere is made on this point by MARSHALL, C. J.

CAPLINGER vs. STOKES.

CHANCERY. *Guardian and ward—Purchase with ward's money.* Property purchased by a guardian, in his own name, with his ward's money, stands charged with the same trust as did the money; and the ward, on coming of age, may, at his option, take the money or the property; and if, with full knowledge of the facts and of his rights, he elects the money, the property, discharged of the trust, vests in the guardian absolutely.

GUARDIAN AND WARD. *Settlement—limitation.* A settlement between guardian and ward, after the ward's majority, determines the trust, and the time of prescription is counted from the date of the settlement, so as to perfect the guardian's title to property purchased with the ward's money, and on the settlement assigned to, and thenceforward held and claimed by the guardian as his own.

The pleadings in this cause consisted of a bill filed in the Chancery court at Carthage, on the 16th of April, 1835, by Samuel Caplinger, against John T. Stokes and Spencer Kelly, and a cross-bill, filed in the same court, on the 24th of May, 1837, by Stokes against Caplinger, and the answers, &c. And from these pleadings and the proof, the following facts appear.

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In the year 1830, the county court of Smith, having removed William Sullivan from his guardianship of John T. Stokes, appointed Samuel Caplinger in his stead. In February, 1831, Caplinger received from Sullivan \$2,492 32 cents and a half of Stoke's estate, and afterwards down to November, 1833, various other sums for interest and hire of slaves. In the interval between February, 1831, and the 25th of November, 1833, Stokes, having married, became desirous to go into business as a merchant, and wished Caplinger to pay his funds into his own hands, which Caplinger agreed to do, and did, Spencer Kelly, Stokes' father-in-law, agreeing to indemnify him. Stokes became of age on the 27th of September, 1833, and on the 25th of November afterwards, Caplinger settled with him, by the intervention of O. B. Hubbard, Esq. of Carthage, and a balance was found in Caplinger's hands of \$367 36 cents, of which sum he paid down in a note, \$310, leaving due Stokes \$57 36 cents. In July preceding, Caplinger had obtained a decree in chancery in behalf of Stokes against Sullivan, for \$312 66 cents. When the bill in that suit was filed, it was agreed between Caplinger and Kelly—the latter of whom had been appointed guardian of two of Stokes' younger brothers, instead of Sullivan, in whose hands their estates also remained—that Kelly should pay half the costs of that suit, since by ascertaining the balance due Stokes, which would be done in the suit, the balance would also be ascertained which would be due to Kelly's wards. The costs which Caplinger had to pay in that suit amounted to \$61 66½ cents, and the county court of Smith allowed him out of Stokes' estate for his trouble and expenses in managing it, \$98 50 cents. This sum and the costs just mentioned make the sum of \$150 16½ cents, which Caplinger claimed from Stokes and Kelly, but which they refused to pay. About the time of the settlement between Caplinger and Stokes, the former gave the latter his note for \$35, the hire of a slave, a transaction not connected with their relation of guardian and ward. On this note Stokes sued Caplinger, who tried to set off his above mentioned demand, but failing, and a judgment having been rendered against him for said note and interest, \$50

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68 cents, he filed the original bill in this cause for an account, and thereupon to be allowed \$150 16½ cents, and for an injunction against the judgment for the \$50 68 cents. The bill was taken for confessed against Kelly, and Stokes answered it, admitting all the above facts,—but insisting, that he ought only to pay half the costs paid by Caplinger in the suit against Sullivan, and that Caplinger ought not to be allowed any thing for his guardianship.

In his cross bill he sets up a claim which is also hinted at in his answer; namely, that Sullivan paid Caplinger \$1100, part of his estate, in several slaves, whom Caplinger had kept, accounting to him for the money only, whereas the negroes and their increase are worth much more.

Caplinger answered the bill, stating that this affair happened at the time when Stokes was anxious to realise his estate in money to be used in trade; that Stokes himself received from Sullivan, at the same time, some negroes, whom he immediately converted into money to be thus used; that he received from him as his guardian the value of the negroes in question, \$1100, being the price asked for them by Sullivan himself; that Sullivan had offered Stokes the negroes at \$1100 dollars, but he refused them, saying he wanted money, whereupon the negroes were sold to Caplinger, who paid the price of them to Stokes, the transaction being designed to put Stokes in immediate possession of his property, in the shape most desired by himself.

The cause was heard on the 10th of July, 1838, by his Honor Chancellor WILLIAMS, of the eastern division, who dismissed the cross bill and pronounced a decree on the original bill in favor of Caplinger against Stokes for \$124 33 cents, and against Kelly for \$25 83 cents. Stokes appealed in error.

HUBBARD and MEIGS for Caplinger insisted that as Stokes December 5, 6. admitted in his answer the correctness of the settlement made by Hubbard he was precluded from disturbing it now, to which purpose they cited Fonbl. Eq. 445, top page Laussat's Ed. note (†), and *Prevost vs. Gratz*, 1 Peter's C. C. R. 368, and contended, that having made this settlement after he came of age, it amounted to a deliberate confirma-

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tion of the transaction whereby the negroes had been sold to Caplinger by Sullivan, and was something more than simply an acquiescence, which, nevertheless would itself be sufficient to bar his present claim. Moreover they distinguished this case from the ordinary case of dealing between trustee and beneficiary, because the negroes had never been the property of Stokes, but were Sullivan's who simply paid \$1100 of his debt to Stokes by a sale of the negroes.

They further insisted, that as Stokes came of age on the 27th of September, 1833, and the cross bill, in which he makes claim to the negroes, was not filed till May 24, 1837, more than three years after the removal of his disability, he was barred by the statute of limitations from setting up the present demand; and to this point they cited 14 Serg. & Rawle, 394; Fonblq. Eq. Laussat's Ed. top page 246, 247 and note.

R. L. CANUTHERS, for Stokes, said that a guardian's trust is one of obligation and duty, not of speculation and profit. He can reap no benefit from the use of the ward's money. He cannot act for his own benefit in any contract, purchase or sale. The advantage of any trade or purchase is to accrue entirely to the benefit of the ward. 2 Kent's Com. 229. Here it appears from the proof that the negroes and their increase are worth \$3000 dollars. Shall this speculation come to the benefit of the guardian? It is said, however, that the ward was present at the settlement between Caplinger and Sullivan, and took such negroes as he wanted, and refused to take those which were transferred to Caplinger, and preferred receiving the money. But he was a minor, and no act of his could, in the least affect his legal rights. Nor is it conceived, that the fact of his receiving part of his estate on the settlement a month after his majority, will estop him from now asserting his rights. Any advantage taken of a ward soon after he comes of age, when he is presumed to be under the influence of the guardian, will be corrected by a court of chancery. He says in his answer he did not agree to the settlement but disputed it.

The statute of limitations does not apply to a case of this description. It does not run between an administrator and

distributee, as was admitted last term in the case of *Moore vs. Crutcher and Douglass*, 10 Yer. 406. In that case the administrators had paid over the money, six years before the suit was brought, to the trustees of Campbell Academy, who claimed it as their own, and appropriated it. A suit for a legacy is not bound by the statute. 3 Haywood, 221. When the relation of trustee and *cestui que trust* exists in fact, not by implication, the statute of limitations does not run. 3 Yer. 201. In this case, the transactions of the guardianship are not closed, nor were they at the filing of his cross bill. Stokes has never waived his claim to the negroes; and though he received a few hundred dollars after he came of age, yet at that time he claimed the slaves or their value. Caplinger never had any title to the slaves, because any title that he might procure with the ward's money, in equity enures to the benefit of the ward, and is his title and not that of the guardian.

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GREEN, J. delivered the opinion of the court.

It is certainly true, that if a guardian purchases property with his ward's money, although he take the title in his own name, he does not thereby, acquire an absolute right to the ownership of it. He cannot reap a benefit from the use of his ward's money. The advantage of any trade or purchase accrues to the benefit of the infant. 2 Kent's Com. 229. But the ward, when he arrives at age, is not bound to regard the purchase, as for his benefit, and to take the property so obtained. It is his property, only at his election. If he elect to take the money he may do so, and the title to the property becomes absolute in his guardian.

In the case before us, Stokes, the ward, married when about nineteen years old, and received from his guardian, in money, much the larger proportion of his estate. He entered into business, and transacted his own affairs until he was of age. A few months after he became of age, he settled with his guardian, and although he spoke of his claim to the negroes, he waived his right and received the balance of his estate in money. This settlement, we think, constitutes an

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election on the part of Stokes, to take the money and not the negroes.

It is true, the dealing of a guardian with a young ward, shortly after he becomes of age, is looked upon with suspicion, on account of the influence the guardian is supposed to exercise, and he will not be permitted to retain any advantage, he may have derived from such dealing. But the circumstances of the parties must be looked at in these, as well as all other cases, where the fact of imposition is to be inferred from their general relation to each other. We think that the acts of a young ward, just arrived of age, who has acted long for himself, who has not been under the immediate control of his guardian, and who is well acquainted with the description and value of his estate, are to be taken much more strongly against him than in cases where none of these means of resisting the influence of his guardian and preventing imposition exist. In this view of the case, we are of opinion, that Stokes' retention of the money, paid him before he was of age, and receipt of the balance after he was of age, with a full knowledge of all the facts, having acted for himself for several years, removed, as he was, from the influence of his guardian, constitute an election to take the money and not the negroes, by which he is bound.

But if this were not so, the statute of limitations is a bar to his recovery. Caplinger has certainly held adversely to him ever since the settlement. He then claimed the negroes as his own, and resisted the claim set up by Stokes. This adverse holding for himself, with the knowledge of Stokes, puts an end to the relation of trustee and *cestui que trust*.

From the date of this settlement the statute of limitations commenced running, and as this bill was not brought in three years from that time, the bar is formed.

The decree must be affirmed.

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MEADOWS vs. HOPKINS.

VENDOR AND PURCHASER. *Relation between them.* The relation between them is similar to that of landlord and tenant. Neither the vendee nor the tenant can do any thing in prejudice of the title under which they hold. If there be an incumbrance upon a vendor's title, or an adversary title, and it be extinguished by the vendee, it will enure to the benefit of the vendor, who will be bound to make an abatement in the purchase money equal to what it cost to clear the title. This is the result of the relation; and it follows whether the vendor had any title when he sold or not. See *Acc. Galloway vs. Finley*, 12 Peters, 264: opinion by CATRON, J. page 294.

Thomas Meadows filed his bill in the circuit court of Warren, on the 25th of July, 1833, and his supplemental bill on the 29th of January, 1834, which, on the 1st of July, 1836, were transferred to the chancery court at McMinnville, against Thomas Hopkins, to enjoin the collection of two judgments, amounting together to \$356, which Hopkins had recovered against him in the county court of Warren. The bill stated, that the judgments were for the unpaid balance of the purchase money of two tracts of land of fifty, and ten acres, bought from one Morbury, about the 7th of December, 1820, for \$500; to secure which he had given Morbury his three several promissory notes, two of them for \$200, and the third for \$100; that Morbury had executed to him his bond in the penalty of a thousand dollars, conditioned to make him a general warranty deed to the land when the last payment of the purchase money should be made, which was to be done against the 7th of June, 1823; that he had been put in possession of the land by Morbury about the 5th of January, 1821, had held it ever since, and made improvements on it worth \$1000; that Morbury had assigned his notes to Hopkins, having, as complainant supposed, never had any title to the land, but sold it merely as agent of Hopkins, who was a large landed proprietor; that he had paid Hopkins one of the notes for \$200, and part of the other, for the balance of which he executed a new note to Hopkins, dated the 14th of April, 1831, for \$168, and had also paid the interest on the note for \$100; that Hopkins had, from time to time, promised to make him a title without doing it; that he was now advanced in years, much immersed in business,

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which kept him out of the state; was then, and had been for some time absent, and if he paid the money to his agent, or attorney, he should not know how to get a title, &c. praying that Hopkins might be compelled to exhibit his title, and should it be good, that it might be divested out of him and vested in complainant, and if not good, that the provisional injunction prayed for might be perpetuated.

The process asked for was issued, and on the 2d of Feb., 1835, Hopkins filed his answer, stating that one Denton had sold the tract of fifty acres to Morbury, to whom he had given his bond for title; that Morbury being indebted to defendant, had, on that consideration, assigned him Denton's bond and Meadows' notes; that Denton had afterwards made him a deed for the land, which, though very recently seen by him, had been so mislaid that he could not file it with his answer; that the tract of ten acres had been granted to himself by the state, and he filed the grant with his answer; that the legal title to both tracts was in him, and he was willing to make the title so soon as the purchase money should be paid. This answer having been replied to, Hopkins died before trial; and at January term, 1837, of the chancery court, Meadows filed a bill of revivor against the heirs of Hopkins and James P. Thompson, his administrator. At the same term, Thompson filed a cross bill against Meadows and the heirs of Hopkins, reaffirming the statement in Hopkins' answer, as to his title to the land, and charging that Meadows had been in the uninterrupted possession thereof, under the contract with Morbury since January, 1821, which possession, under the statute of limitations, made his title indefeasible; moreover, that availing himself of that possession, he had entered the land and procured a grant for it, at an expense not exceeding five dollars, &c.; demanding a discovery of the time when he made the entry and procured the grant, and the expense attending it, and praying that he might be compelled to pay the purchase money. To this bill Meadows demurred.

On the hearing in the chancery court, his Honor the Chancellor, sustained the demurrer to the cross bill, and pronounced a decree, annulling the contract between Meadows

and Morbury, directing that the administrator of Hopkins should refund to Meadows what he had paid Hopkins towards the land with interest; that the injunction against the judgment should be perpetuated, and that the administrator pay the costs, &c. The administrator appealed in error.

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TAUL and MEIGS for Meadows.

JAMES CAMPBELL for Thompson.

TURLEY, J. delivered the opinion of the court.

Complainant purchased of John Morbury sixty acres of land for five hundred dollars, for which he executed three notes, two for two hundred dollars each, and one for one hundred dollars, and received from Morbury his bond with a penalty of one thousand dollars for the execution of a deed of conveyance with general warranty for said land, when the last payment should be made. Complainant, by virtue of this contract, entered into possession of the premises in January 1821, and for ought that appears has been in the peaceable possession ever since. After the contract, Morbury assigned complainant's notes to Thomas Hopkins, who received them with a knowledge of the consideration for which they had been executed, and who promised to comply with the condition of the bond; this he did not do, during his life, nor has his administrator or heirs done so, since his death, but his administrator has filed a cross bill, in which he alleges that Hopkins had a good title to the land, but that the evidences had been lost by casualty, and that the complainant for his better protection had entered the land in his own name and obtained a grant therefor from the state, and prays for such relief, as under the circumstances the law allows him. To this cross bill there is a demurrer, which is sustained by the chancellor, and to reverse whose opinion an appeal is prosecuted to this court.

It is not denied by the counsel for the complainant, that when a purchaser extinguishes an incumbrance on his vendor's title, all he can equitably ask is an abatement of the purchase money equal to what it cost to remove the incumbrance, but it is contended, that in the present case, the vendor had no title, that therefore it was a fraud in him to

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pretend to sell, and that the principle of law as recognized does not apply.

1. We are unable to recognize the correctness of this defence—because, the defendant Hopkins in his answer, alleges, and the statement is reiterated by his administrator in his cross bill, that he has the legal title to the premises, but has by casualty been prevented from producing the evidences thereof. If this allegation be true, and upon demurrer, we must presume it to be so, and there be any thing in the proposition urged upon the court in behalf of the complainant, the ground upon which the distinction is made to rest, is removed—the vendor had title, and there was no fraud in selling to complainant.

2. But we do not recognise the truth of the proposition* con-

* The proposition alluded to was advanced by the same counsel, who argued the case of *Meadows vs. Hopkins*. in the case of *Hopkins' administrator vs. Yowell*, which depending upon the same principle as the former, these two were brought on and argued together. That case was as follows:—

On the 4th of February, 1826, Hopkins sold Yowell twenty acres of land for \$100, secured by note, and gave his bond to make him a general warranty deed for the land.

On the 23d of January, 1832, Yowell paid the purchase money and took up his note, but Hopkins failed and refused to make the title; and in fact had no title but an entry never ripened into a grant. After paying the purchase money, Yowell sued Hopkins on the title bond, and recovered judgment for about \$220, damages. Hopkins filed his bill to enjoin this judgment upon the ground that as Yowell got the possession of the land by virtue of the purchase from him, which possession, having been continued more than seven years, is now protected by the statute of limitations, he ought not to be allowed to collect the damages adjudged to him for the breach of the title bond.

Upon this statement the counsel argued.—But Hopkins does not show that this land was ever granted, nor does it appear that Yowell's possession was held by actual enclosure, and therefore *non constat* that the possession will be protected by the statute of 1819. As Hopkins has been paid for the land, and does not show that he has title, or that he is capable of making an available general warranty deed, it is not perceived how he can shield himself from the consequences of a breach of his title bond. He covenants to make a title, which he acknowledges he cannot make, does not offer to return the purchase money which he acknowledges he received, and yet asks to be relieved from the payment of *damages* for the breach of his covenant.

It is also to be observed, that Hopkins exhibits no entry, plat and certificate of survey, or other evidence of title; and in the absence of all and every of these, his assuming to sell the land is a fraud,—and if countenanced opens the door to the most monstrous practices by the unprincipled speculator, enabling him to sell to ignorant men the unappropriated land of the state, and when they discover the trick, and avail themselves of their occupancy, refuse to pay back the purchase money on the pretence that they became occupants by virtue

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tended for by the complainant. We do not think that a vendor's right to ask that a title purchased in by his vendee, shall enure to his benefit, upon his paying the purchase money, depends upon the question, whether he had title or not to the premises at the time of the sale? but results from the relation which it has been found expedient to establish between vendor and vendee, to preserve the confidence, which in matters of contract, ought to exist between man and man, and prevent the obtaining of undue advantage from information acquired by means of such contract.

This relation is somewhat similar to that which exists between a landlord and his tenant. Having recognised the title in the one instance, by the acceptance of a lease, and in the other, by a purchase, you shall do nothing to the prejudice thereof, so long as the relation continues.

That this right of a vendor does not depend upon the fact of his having a title at the time of the sale, is clearly demonstrable. If he had the title there is none other for the vendee to purchase, for if he purchase a conflicting title, which is inferior to that of his vendor, he does it at his own expense, and can never ask him for remuneration. If he had no title, then the complainant says he is deprived of the right. According to this mode of reasoning, there never can exist a case, in which the principle of law as admitted can apply; and it is a dead letter, unless it be confined strictly to the case of an incumbrance connected with the title as a mortgage or a trust, which cannot be contended for with success.

In the present case, the complainant has but little cause

of the purchase, which was of itself a fraud. In short, it is earnestly insisted, that unless Hopkins had actually shown the court an entry, a plat and certificate of survey, or some other evidence that he had, in point of equity, extinguished the title of the state, that title is not to be regarded as an incumbrance on his title. The rule is not denied that where a purchaser extinguishes an incumbrance on his vendor's title, all he can equitably ask is an abatement of the purchase money equal to what it cost to extinguish the incumbrance. But when a vendor has no title at all, it is submitted, that it is a fraud in him to pretend to sell, and that the real title cannot be regarded as an incumbrance upon no title.

Sustain Mr. Hopkins in this, and a man may become general occupant of all the vacant land in the state.

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of complaint. He obtained possession of the land contracted for, under his contract in January, 1821; he has remained in the undisturbed possession thereof ever since, and to make assurance doubly sure, has entered and obtained a grant for it in his own name. There would be neither law nor justice in permitting him to hold the premises under this title, in exclusion of the rights of Hopkins, and he must be satisfied with remuneration for the trouble and expense he may have been at in procuring the title from the state, under which he seeks to protect himself from the performance of his contract.

The decree will therefore be reversed, and the cause remanded for further proceedings.

The decree entered in this cause, after reciting the facts proceeds—"The court is of opinion, and so declares, that if Hopkins' title to the lands in the pleadings mentioned be defective, as charged in the bill, yet all that Meadows can claim in equity of Hopkins' representatives, is that they shall reimburse him his expenses in perfecting his title if he retains the land. Whereupon the court doth adjudge, order and decree that the decree of the chancellor in this case be reversed; and this court, proceeding to pronounce such decree as the court below should have rendered, doth further order, adjudge and decree that the demurrer to the cross bill be overruled, and that Meadows be required to answer the same, and that this cause be remanded back to the chancery court for further proceedings to be had therein, according to the principle of this decree. The court further decrees, that said James P. Thompson, administrator of Thomas Hopkins recover of said Thomas Meadows the costs that have accrued in this cause since the rendition of the decree in the chancery court. The other costs to be settled in the court below.

WILLIAMS vs. HOGAN.

CHAMPERTY. *Construction of the act of 1821 c 66.* A sale, by one out of possession, of land adversely held, is void for all purposes. It is neither good as against the adverse possession or title, nor as between the parties themselves.

SAME. *Covenant on the warranty.* Therefore the vendee cannot maintain covenant on the clause of warranty in the vendor's deed; and if the fact of the adverse possession appear in the declaration, a general demurrer to any pleading in the case will reach the defect

By deed of bargain and sale with covenant of general warranty, dated May 14, 1828, Sampson Williams conveyed to Edward Hogan, of whom the defendants in error are heirs at law and devisees, 590 acres of land, which was then in the adverse possession of Lee Sadler, and others. Hogan died on the 20th of the same May. On the 31st of August, 1836, the defendants in error sued Williams in the circuit court of Jackson on the covenant of warranty in the deed, declaring in one count as devisees, and in a second, as heirs at law of Edward Hogan, and averring by way of breach of warranty—"that at the time of making the covenant the land was adversely held and possessed by a title superior to that of the defendant, by Lee Sadler, &c. and so the plaintiffs aver that by virtue of the seizin and superior title of the said Lee Sadler, &c. the said Edward Hogan, in his life time, and they since his death have been expelled and kept out of, and from the possession of said bargained land and appurtenances; and so they say that the defendant has not kept and performed his covenant," &c.

The defendant pleaded 1. covenants performed, and this, &c. 2. That neither the plaintiffs nor their ancestors have been expelled from and kept out of possession of the land by superior title and due course of law, and of this, &c. 3. Protesting that the plaintiffs were not out of possession of the land at the time the covenant was executed, neither the plaintiffs nor their executor was or were expelled and kept out of possession, or evicted by due course of law, and of this, &c. 4. That the defendant at, &c. on, &c. offered to sue, and investigate the title and give full possession of the land to the plaintiffs, &c. but they colluded with the tenants and refused to sue or have it sued for, and this, &c. The

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plaintiffs replied to the first plea, and issue was joined thereupon; and they demurred to the other pleas.

At November term, 1836, his Honor Judge CARUTHERS of the fourth circuit, sustained the demurrer as to the 2nd and 3rd pleas, and advised as to the fourth. At March term, 1837, he sustained the demurrer to the 4th plea. At March term, 1838, the issue joined upon the first plea was submitted to a jury, who gave a verdict for \$136 74 cents for the plaintiffs, and they had judgment. The defendant prayed a writ of error.

S. TURNER for the plaintiff in error, insisted that as there was a demurrer in the case, which would reach back to the first error in the pleadings, and the declaration averred that the land was adversely held at the date of the covenant, it was impossible to maintain the action. Because, the case, he said, was under the act of 1821, c 66, against champerty, which prohibits the sale of lands by one who is out of possession, and declares the "bargain, covenant, contract and agreement" to be void. So that to sustain this action would be to say that a covenant, which is void, may nevertheless be the foundation of a legal demand.

A. CULLOM, for the defendant in error, argued that *Randolph vs. Meeks*, Martin and Yerger, 58, decides that the covenant of warranty is broken as soon as made, where, as in this case, the land is, at the time of making it, held adversely to the title of the warrantor.

As to the question upon the statute of champerty, he insisted that this covenant was not affected by that law. It is a statute against fraud, and must be construed to suppress the mischief; and when it declares the deed void, the meaning is, that as a conveyance operative against the person in possession, it is void. He being the person for whose safeguard the statute intended to provide, a different construction of the act, instead of suppressing, would be an encouragement to fraud. Make the conveyance inoperative and void as against the person holding an adverse possession at the time of the sale, and good, as between the parties to the deed, and the mischief is suppressed, fraud prevented and justice done. 9 Johns. R. 60; 1 Johns. C. 81; 10 Mass. R. 267.

REESE, J. delivered the opinion of the court.

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The declaration alleges that at the time of the execution of the deed of conveyance, the land which it purported to convey, was adversely held by a title paramount to that of the bargainor,—and the question is, whether the circuit court upon the argument of the demurrer in the case, should not, on account of that, have adjudged the declaration bad, and the action not maintainable, because of our statute of champerty of 1821, c 66?

It is said, on behalf of the action, that a deed of conveyance or contract of sale for land adversely possessed, although void, by the provisions of the act referred to, as against such adverse claimant, is yet good as between the parties to the deed or contract of sale. This proposition is at war alike with the letter, and the spirit and policy of the act. The act declares that “no person shall agree to buy, or to bargain or sell any pretended right or title in lands or tenements or any interest therein; and if any such agreement, bargain, sale, promise, covenant, or grant be made, where the seller has not himself or by his agent or tenant, or his ancestor, been in actual possession,” &c. Such is the letter of the statute. Its object and policy were, that those in actual possession of land should not be molested by suits founded upon pretended or dormant claims, unless such suits were instituted and conducted, *bona fide*, by the proper owners, upon whom the law had cast the title, for their own proper benefit and at their own proper risk and costs.

The buyer, in view of such purpose, it was especially important to restrain, for it was his ever restless cupidity, stimulated by the low price of these dormant claims, and by the prospect of large profit, which attacked the quiet and repose of society, and made our courts of justice the theatre upon which to consummate speculations, not more respectable, and much more disastrous to society than those of the lottery office or the gaming table.

To give such a construction to the statute, therefore, as would permit the buyer of dormant claims, securely to take a deed or covenant from the claimant, and if he failed to recover by a demise in the name of such claimant, to indemnify him-

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self by a suit against his vendor upon the deed or covenant, would be to encourage, and not to suppress the spirit and practice of champerty.

We are, therefore, clearly of opinion that the action is not maintainable, and that the judgment must be reversed.

THE STATE vs. CURLE.

CRIMINAL LAW. Acquittal. In all criminal cases, of every grade, if the defendant be acquitted by the jury, though the acquittal may have been occasioned by the error of the court, the defendant must be discharged of the offence alleged against him in that indictment.

SAME. Practice—no appeal by the state in such case. If the state appeal in such case, the cause will be stricken from the docket of the supreme court for want of jurisdiction.

The grand jury of Hickman, at June term, of the circuit court, presented—"That the defendant, on the 15th of June, 1837, and on divers days, before and since, in the county aforesaid, with force and arms, was openly, publicly and notoriously drunk, to his great degradation and scandal, and to the evil example of all others," &c.

On the trial, it was proved on behalf of the state, "that the defendant was openly, and publicly, and notoriously drunk, on the day charged in the indictment, in the town of Centreville, in the county of Hickman," which was all the evidence.

MARTIN, Judge, charged the jury—"that to authorise them to find the defendant guilty under said indictment, the evidence should show, that the defendant, on more occasion than one, within twelve months, prior to the finding of the indictment by the grand jury, was openly and publicly drunk in the county of Hickman." Verdict, "not guilty."

The solicitor for the state excepted to the opinion of the court, and appealed in error.

No counsel appearing for the defendant, the Attorney General submitted the following brief—1. The charge of the judge was erroneous. *Tipton vs. The State.* 2 Yer. 542.

2. But the main question here is, can a new trial be

granted on behalf of the state or public prosecutor, in any case, the defendant being acquitted?

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That it cannot, see *Rex vs. Praed*, 4 Burrow, 2257.

In the *People vs. Mather*, 4 Wendell, the court say—
“The right of the court to grant a new trial in case the defendant has been acquitted, where the ground of the application is, that the finding is *against evidence*, it is conceded, does not exist; but whether a new trial can be granted where the acquittal has resulted from the error of the judge in stating the law to the jury, seems to be involved in much doubt.” 266. This distinction is stated by the court in *The King vs Mann*, 4 Maule and Selwyn, 337, and by counsel in *The King vs. Raynell*, 6 East, 313—see note there.

In *Wilson vs. Restall*, 4 T. R. 753, a penal action, Ld. Kenyon said—“Where a mistake of the judge has crept in, and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial.” But he added—“All the cases of indictments, I lay out of the case, because they are criminal cases, and are exceptions to the general rule,” p. 758.

In *The King vs. Reynell*, Maryatt admitted that he had not been able to find any instance where the court had granted a new trial in case of a misdemeanor where the verdict was for the defendant. 6 East, 315. Nor have I. The only case in which I have seen even doubt expressed is that cited from 4 Wendell.

REESE, J. delivered the opinion of the court.

Upon the authority of the cases produced by the attorney general, and the long and well settled practice of all the courts in this state, we are satisfied, that the state in such a case as the one before us, has no appeal. December 14.

Let the cause be stricken from the docket, and the cost be certified to the county court of Hickman for allowance.

NOTE. See post, *Smith vs. The State*.

JETTON vs. THE STATE.

CRIMINAL LAW. Grand Jury. If there be placed on the grand jury panel persons not competent to be grand jurors, the court, to which the panel is returned, may strike them off, and summon others in their stead. 1 Chitty's C. L. 309; 1837, c 53, § 4; c 69, § 2; 1779, c 6, § 4.

SAME. How witnesses sent to grand jury to be sworn. If a witness who is sent to the grand jury be sworn in *open court*, though not in the immediate presence of the judge—or even in his temporary absence from the bench, it is good.

SAME. Indictment and presentment, quashing. The court is not bound to quash an indictment or presentment. The party may be left, in the discretion of the court, to demur, &c. Hawkins, Bk. 2, c 25, § 146; 1 Dev. & Bat. 195.

On the 5th of April, 1838, the grand jury of the corporation of Murfreesboro', presented, that the defendant, "on the first day of March, 1838, with force and arms, in the corporation aforesaid, unlawfully did encourage and promote a certain unlawful game of hazard at cards, for money and valuable bank notes, and then and there, with force and arms unlawfully did play for and bet money and valuable bank notes, at said unlawful game of hazard at cards, contrary to the form of the statutes," &c.

At May term of the court, the defendant, by attorney, moved to quash the presentment, which motion being discharged, the defendant pleaded in abatement;

1. That one Jacob Decker, who was empannelled as a grand juror at the March term of the court for the corporation, &c. for the space of three months next ensuing his said appointment, and during which time, to wit, at the April term of said court, said presentment purports to be found, was neither a freeholder in the state, nor a householder of the state and corporation, at the time of his appointment, or at the time of finding the presentment; and said Decker was, at the April term of the court, excused or discharged from further attendance as a juror, and another individual was elected in his stead, &c.

2. That the presentment had not been found by the grand jury upon their own knowledge, but upon the information of a certain William D. Hicks, who was sent for, and caused to go before the grand jury to give evidence, &c.; and that

Hicks was not sworn before the court to give evidence to the jury, previous to his being examined and giving testimony against the defendant, &c.

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The attorney for the corporation demurred to the first plea, and replied to the second, and issues were joined accordingly.

The court sustained the demurrer; and a jury was empanelled to try the issue of fact upon the second plea, to whom testimony was submitted in substance, that when the witness was sworn, the mayor and aldermen were not upon the bench, but court had not adjourned; that two of the aldermen were in the court house, when the clerk swore the witness, and the mayor was standing at the door. Upon which testimony the court charged the jury, that the court was composed of the *mayor, two aldermen, and the constable*; and if the witness was sworn when any one of its members was present, it would be a swearing of the witness in the presence of the court. The jury found, that "the witness in said second plea specified was sworn before the court."

The defendant moved for a new trial of this issue, which being refused, he pleaded not guilty, and being put upon his trial was convicted. The evidence submitted to the jury upon the general issue is not set out in the record. The defendant moved for a new trial, which was refused, whereupon he tendered his bill of exceptions, in which the case is stated as above, and exception is taken to the several opinions of the court. 1. In refusing to quash the presentment. 2. In sustaining the demurrer to the plea. 3. In charging the jury upon the trial of the issue on the second plea. 4. In overruling the several motions for a new trial.

No counsel appearing for the plaintiff in error, the Attorney General submitted, on behalf the state, the following brief—

1. It is always discretionary with the court whether they will quash an indictment or presentment; and it cannot be assigned for error, that they refused to do it. 1. Chitty's C. L. 299 to 304.

2. The panel was not void because one incompetent juror was placed on it. The court could remedy the error by sub-

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stituting another. As to the 1st proposition, 1 Chitty's C. L. 309; as to the 2d Acts of 1837, c 53, § 4; c 69, § 2; 1779, c 6, § 4.

3. It is not necessary to keep any record of the swearing of a witness sent to the grand jury. It is sufficient that they be sworn. Perhaps it is not necessary that they be sworn in open court. See *United States vs. Coolidge*, 2 Gallison, 384; 5 Yerger, 364. It is certainly unnecessary to swear them before the court. If the court be open it is enough. *State vs. Cain & Price*, 1 Hawk. 352. N. C. Act of 1797, c 2, § 3; Ry. & M. C. C. R. 401. See the mode of swearing witnesses sent before the grand jury in the King's Bench, 1 Gude's Prac. 84.

GREEN, J. delivered the opinion of the court.
December 15. There is no error in the judgment in this case. The motion to quash the presentment was properly overruled. It does not appear in the record, upon what grounds this motion was made, but we perceive no defect in the presentment wherefore it should be quashed.

The plea that Decker, a grand juror, was not a qualified juror, and was discharged, and another appointed and sworn in his place, is not a good defence, and the demurrer to it was properly sustained. The panel being incomplete, by reason of the want of qualification of one of the number, the court had a right to order another to be summoned. When the defendant was presented, Decker was not one of the jurors.

The second plea, that the witness on whose evidence the presentment was made, was not sworn before the court, is replied to and the jury found a verdict, that he was sworn before the court. There was error in the court in saying that the clerk and constable constitute members of the court, and that if the witness was sworn before either, he was sworn before the court. But we think that if he was sworn while the court was open, although the mayor and aldermen were not on the bench, or immediately before the witness, the swearing was sufficient.

As the evidence is clear, that the court was open when

the witness was sworn, the erroneous statement of the court, above referred to, was not material. Indeed, the issue upon the plea, that the witness was not sworn before the court, was immaterial, and may be disregarded. Upon the merits of the case no question is made.

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Let the judgment be affirmed.

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CONSTITUTIONAL LAW. *Practice—continuance.* Where a defendant in a criminal case, offers a sufficient affidavit for a continuance, stating the facts, to which the absent witnesses are expected to testify, it is error to refuse a continuance, even though the prosecuting attorney offers to admit, not simply that the witness would testify to the facts stated, but also, the truth of the facts stated: for the defendant has the constitutional right, to have the witnesses personally present at the trial. Art. 1, § 9.

PRACTICE. *Continuance.* Where the circuit court refuses a continuance for the insufficiency of the reasons stated in the affidavit, the court of errors would be extremely cautious and circumspect in controlling its discretion, though they entertained a clear opinion that the reasons were sufficient.

The plaintiff in error and another were indicted in the circuit court of Hickman, at July term, 1838, for *open and notorious lewdness*. A *capias* was issued for the defendants, and being in custody thereupon, they were put to the bar for trial, on the 11th of July, before his Honor Judge DILLAHUNTY. The plaintiff in error moved, upon affidavit, for a continuance of his cause. The affidavit stated the names of the witnesses who were absent, the reasons for their absence, and what he expected to prove by each. The attorney general, THOMAS, agreed that the affidavit might be read as evidence; and his Honor thereupon ordered the jury to be sworn and the cause to be tried. The jury found the defendant guilty and assessed a fine against him of one hundred dollars. He moved for a new trial, which was refused, and the court pronounced judgment of imprisonment in the common jail of Hickman, for four months, and that the state recover the fine, &c. A bill of exceptions was tendered in which the evidence was set out, as also a copy of the affidavit for the continuance, and the defendant appealed in error.

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It is unnecessary to detail the facts of the case, or those stated in the affidavit, with respect to which latter, it is enough to say that they were considered by the court to present a sufficient ground for a continuance; and the only question was—whether, where that is the case, the court can refuse a continuance because the prosecuting attorney admits the facts stated in the affidavit?

DEW, for the plaintiff in error, insisted that the court has no such power. He said that the rule laid down in *Hammonds vs. Kemer & Wife*, 3 Haywood, 145, that it is not error to refuse a continuance where the evidence wanted is admitted by the adverse party, is not applicable to criminal cases, which distinction he said was sustained by this court in *Rhea vs. The State*, 10 Yerger, 258.

December 14. The Attorney General for the state.

CAHAL, in reply, cited the constitution of Tennessee, art. 1, § 9, and contended, that it was a violation of the right of the accused in criminal cases, "to meet the witnesses face to face," to force him to a trial in the absence of his witnesses. He said that the right being *absolute*, the party could not be deprived of the enjoyment of it but by his own *laches*; that if the defendant cleared himself of the just imputation of neglect in the use of the lawful means to obtain the witnesses, the court could not say that there was any equivalent for this absolute right, which, if he had extended to him, would equally maintain his security; that to have an admission on behalf of the state of the facts which he expected to prove by his witnesses, was not "to meet the witnesses face to face," nor equivalent to it; and if it were equivalent, it is not the right itself, and to assume to substitute equivalents, is to attempt to defeat what is absolute and indefeasible.

REESE, J. delivered the opinion of the court.

December 15.

We deem none of the errors in this case assigned upon the record, or in argument, as meriting discussion, except the refusal of the circuit court to continue the cause upon the grounds stated in the affidavit of the defendant; and with respect to that, the only proper inquiry for us is, whether those

grounds are sufficiently material to constitute good cause for the postponement of the trial?

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To respond correctly to this inquiry, it is our duty to limit our view of the case to the character of the offence charged in the indictment, and to the aspect of the defensive grounds set forth in the affidavit, as bearing upon that offence; and we are not at liberty to look into the proof upon the trial as exhibited in the bill of exceptions. Considering the question in this view, we are of opinion that the affidavit did contain sufficient grounds for the continuance of the cause. But as was said by us, in the case of *Gray vs. The State*, 10 Yer., we regard the supervisory control of this court, over the legal discretion of the circuit courts in the application and enforcement of their rules for the conduct of causes before them, as of very delicate character, exacting from us, the utmost caution and circumspection, and to be exerted neither frequently, nor upon slight grounds. If, therefore, the circuit court had merely refused to continue the cause upon the ground of the insufficiency of the affidavit, we should have hesitated long before we would, for that reason, have reversed the judgment. But the record manifests that the circuit court thought as we do, that the affidavit was sufficient, and refused to continue the cause, because the attorney general offered to admit, not that the facts stated in the affidavit were true, but that the witnesses there mentioned, would, if present, testify as stated by the defendant.

In the case referred to in 10 Yerger, we say, that the practical operation of such an arrangement upon the rights and the fate of the defendant must often, if not always, be perfectly illusory. We now go further than the intimation contained in that case, and say, that when the admission of the counsel for the state, is not merely that the witnesses would testify as stated, but that the facts are true as set forth in the affidavit, such admission should not preclude the defendant, in a criminal case, from his constitutional right of having the witnesses personally present at the trial.

It were needless to urge upon practical and enlightened minds, the difference, in point of legitimate effect, between

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the personal presence of candid and respectable witnesses, who testify to facts in their detail, ramification and bearing, and the general admission of these by an attorney general, little impressing, perhaps, the minds of the jury, and constituting, as to its extent and bearing, a fruitful source of difficulty and dispute.

It were needless to urge how such a practice would tempt the unfortunate defendant, if he must forego the advantage of the personal attendance of his witnesses, to seek an undue equivalent, by amplifying, at the hazard of perjury, the statement in his affidavit, so as to obtain the broadest possible admission from the state. In every view, therefore, as it regards the rights of the defendant, and the safe, equal and pure administration of justice, the practice referred to is improper and erroneous.

Let the judgment be reversed and a new trial be granted.

CRAIGHEAD *vs.* THE STATE BANK.

WITNESS. Competency—Bail. Prosecution surety or bail may be made a competent witness for the party for whom he stands bound, by releasing him of record and substituting another in his stead.

CONSTITUTIONAL LAW. Release of bail. It is not a violation of the obligation of contracts to release prosecution surety or bail, and substitute another instead of the first—there being no contract on part of him for whose indemnity the surety was taken.

SAME. Bank of the State. The charter of the late Bank of Tennessee, it seems, was constitutional, according to *Briscoe vs. The Bank of the Commonwealth of Kentucky*. 11 Peters, 257.

EVIDENCE. Admission. On presenting his account to a defendant, if he admit the correctness of the charges, but say he believed he owed the plaintiff nothing, and had paid him all he ever owed him, yet give no reason for his belief, and show nothing in support of it, the whole must be left to the jury, who may reject the explanation, and give their verdict on the admission.

SAME. Expressio unius, &c. Claiming a credit as to one item of an account, and remaining silent as to the rest, is a strong circumstantial proof of the correctness of the rest.

DEBT. Extinguishment. Taking a bill single in consideration of a simple contract demand extinguishes it, and no action can be maintained founded upon the consideration.

PROMISSORY NOTE. The word *note*, or phrase *promissory note*, in a bill of exceptions, will be presumed, without more, to mean a security not under seal.

The plaintiff in error having been a customer of the Bank of the State of Tennessee, his account remained open and unsettled from its commencement, about the 27th of November, 1824, till the 18th of July, 1829, the day of the last entry therein. When Nicholas Hobson became cashier of the Bank, in January, 1830, finding the account in this condition, he stated it from what appeared on the Bank books, and from the notes and checks of the plaintiff in error, which he found in the Bank. According to the custom of the Bank, in making out said account, he treated Craighead's prior notes as checks, and charged him with the discount upon each successive note given to the Bank for loans, considering that said account had not been paid by him at the time of giving the notes. After he had thus made out the account, he cancelled the notes by impressing upon them the mark denoting payment being the letter P cut through them. The book was then put into the hands of Craighead, who, after keeping it several days, called at the Bank and demanded a credit for one Richmond's note, to which, upon examination

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he was found entitled, and it was allowed. The account as first stated exhibited a balance in favor of the Bank of \$404. 22 cents, which, after allowing him Richmond's note, was reduced to \$104 22 cents. In endeavoring to effect a settlement with him, Craighead never admitted to the officers that he owed the Bank any thing; on the contrary, he seemed to think he had paid up all he had ever owed, but did not explain how to their satisfaction. His account was therefore placed in the hands of the Bank Attorneys, Anderson and Clark, with the latter of whom, on his presenting the account for settlement, Craighead examined it item by item. Upon going into the examination, he said he did not believe he owed the Bank any thing, and if he could be convinced he did, he was willing to pay it. Upon completing the examination, he said the items of the account were correct, but he did believe he owed the Bank nothing, and that he had paid it all he ever owed it.

Refusing, therefore, to pay the balance claimed, suit was instituted in Davidson county court on the 27th of June, 1831, Anderson and Clark executing the ordinary bond for its prosecution. The declaration was in *indebitatus assumpsit* for 250 dollars loaned and advanced, paid, laid out and expended. The defendant pleaded—*non assumpsit*, *non assumpsit* within three years, and *actio non accrevit* within three years; and issues were thereupon joined.

On the trial in the county court, at January session, 1832, the plaintiff offered James P. Clark as a witness, but it being objected by WASHINGTON, attorney for the defendant, that being surety for the prosecution of the suit, he could not be examined as a witness, the court ordered his bond to be cancelled, and a new bond with other surety to be substituted, and Mr. Clark was examined, to which the defendant excepted on the ground that the court had no power to refuse the first bond and receive another without his consent. The Bank had judgment, and the defendant appealed to the circuit court, where, at January term, 1833, the judgment of the county court was affirmed. The defendant now appealed to the supreme court, and, at March term, 1835, the judgment of the circuit court was reversed, the court deciding the

circuit court had erroneously permitted the items of the account, which were within three years next before the commencement of the suit, to draw after them and take out of the bar of the statute of limitations those items which were not within three years. 7 Yerger, 399.

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The cause was remanded to the circuit court, where it was tried again before his Honor the late Judge STEWART, and a jury of Davidson, at November term, 1835. Upon the production of the first witness by the Bank, the defendant objected, that no evidence could be received upon the plea of *non assumpsit*, because it appeared from the act of Assembly establishing the Bank, that it had been established for the purpose of emitting bills of credit; and that all its other powers being subsidiary to the main purpose, which was contrary to the constitution of the United States and against law, no valid contract could be made with such a corporation. The court admitted the evidence, and then James P. Clark was offered as a witness, to whose competency the defendant objected, that having been surety for the prosecution of the suit and entered into bond as such, he could not be discharged from liability thereupon, and had not been, because the order of the county court above recited, which assumed to cancel his bond and substitute another in its stead, was a nullity. But the court overruled the objection, and the witness gave testimony; and by him, and Hobson, and Berryhill, who had been a clerk in the Bank, the facts above stated having been proved and submitted to the jury, the defendant requested the court, among other things, to charge them—

That it required a matter of account to support the declaration; that the notes mentioned in the account filed were matters of special contract, and not matters of account; that the suit was not founded upon the notes or either of them; and that a matter of special contract could not be converted by one party into a matter of account, merely by stating it as an account.

But the court charged the jury, that a note was a matter of special contract, and so long as it was in existence, it must be sued upon and the consideration of the note could not be sued upon as matter of account; but if there was an agree-

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ment, that the note should be delivered up and canceled, and in consideration of the delivery up and cancelation of the note, the maker promises to pay the amount of the note, that promise would be matter of account, and would support the declaration in this case; that if, from the evidence, the jury presumed, as they might do, that there had been an agreement that the last note contained in said account, should be delivered up and canceled, and that it was delivered up and canceled, and that the defendant promised, in consideration thereof, that he would pay the amount of said note, then they could find a verdict for the amount of said note, against the defendant, and also for such items of discount in said account as were within three years before the commencement of the suit.

The jury found a verdict for the plaintiff for \$104 22 cents, and they had judgment therefor and 12½ *per cent.* interest from the 20th of January, 1832, the time the judgment was rendered in the county court. The defendant moved for a new trial which the court refused to grant, and he thereupon filed his bill of exceptions, from which the above statement is extracted, and appealed in error.

WASHINGTON, for the plaintiff in error said—upon examination of the document, called an account, it will be found, that the only items of charge contained in it, against Craighead, which are *within* three years before the commencement of the suit, are all *notes*; the first bearing date on the 17th of July, 1828, for 84 dollars; the next bearing date on the 19th of October, 1828, for 76 dollars; the next bearing date the 17th of January, 1829, for 69 dollars; the next bearing date on the 18th of April, 1829, for 63 dollars; and the last bearing date on the 18th of July, 1829, for 57 dollars.

It will be further found, from an examination of that side of the account wherein the Bank debits itself, that each of the above mentioned notes, is a renewal of the one immediately preceeding it; and that the difference in amount, results from the calls made at each successive renewal, and also, that this difference constituting the call, was invariably paid by Craighead. It will also appear, that upon such renewal, instead of crediting Craighead with the exact amount of the renewed

note, he was merely credited with the proceeds, minus the discount.

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Therefore, when this suit was commenced, there was no subsisting note, or other charge, against Craighead, but the said last note of 57 dollars; and, if Craighead paid the discount upon that, there was only due 56 dollars 13 cents.

Giving the testimony of Clark all the favor that it can possibly have, and still it will produce no effect. The admission of Craighead, of which he speaks, merely establishes the account; for it relates to nothing else. And, the account, upon its face, exhibits the result above stated, from which, there is no escape.

The plaintiff in therefore, error relies upon the following grounds:—

1. This is an action of *assumpsit*, upon the common counts; and cannot be maintained, because it should have been brought upon said last mentioned note of 57 dollars.

2. The jury found against Craighead, for the amount of the note of 84 dollars, being the one dated on the 19th of July, 1828, and interest; that being the first note executed within three years before the commencement of the suit. That note was extinguished by payment, when the next succeeding one was given; and all the other notes, were extinguished in like manner, in succession, down to the last one of 57 dollars.

3. The note of 57 dollars, had the bank mark which indicated payment upon it, put there by the officer of the Bank, which was a cancelment by the holder. No suit, therefore, could be maintained upon it at all.

4. The circuit Judge charged the jury, that no suit could be maintained, where there was a note, except upon the note; but that, a suit might be maintained upon the consideration of a note, which had been destroyed by the holder; provided, it had been agreed between the holder and maker, that if the latter would destroy it, the former would pay the consideration; and that they, the jury, were authorized to presume such an agreement.

In this case, there was not a particle of proof relating to any such agreement; and therefore, the charge of the court

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Besides, to recover upon such an agreement, would require a special declaration, founded upon it. Here there is nothing but the common counts, for money lent, and money paid, laid out and expended.

MEIGS, for the Bank, argued that from the fact that Craighead had kept the account several days and then returned it and claimed a specific credit, the jury might lawfully infer, not only that the rest of the account was just, but also, an acquiescence on part of plaintiff in error, in the mode of stating the account, equivalent to an agreement that the notes should be cancelled, and to a promise to pay the balance as matter of account upon the original consideration.

2. That the securities executed by the plaintiff in error for loans were denominated, throughout the record, "notes," and if taken in their technical sense, they were not under seal, and therefore did not extinguish the implied undertaking to repay the money loaned, for which, of course, *indebitatus assumpsit* would lie. Tomlin's Law Dic. Debt, III.

December 16. TURLEY, J. delivered the opinion of the court.

The first cause of error assigned in this case is, that James P. Clark, who was original surety for the prosecution of the suit, was discharged by the court, and other surety taken in his stead, and he permitted to be examined as a witness.

It is said that the court had not power to release him from his liability incurred as surety for costs, and that he was therefore interested in the event of the suit and an incompetent witness.

We do not think so. Surety for the prosecution of suits, appeals, and bail, are taken by the officers of court under the provisions of the law, and it has always been the practice in this state, upon a proper case made out, to substitute other security in the place of the original; and, this being done under the inspection of the court, no harm can be done to the person, for whose use the surety was given, as the court will be careful to take none but what is amply sufficient to secure the end designed.

The exercise of this power is not a violation of the obligation of contracts under the provision of the constitution of the United States and the State of Tennessee. For there is no contract on the part of the person intended to be benefited by taking the surety. The law takes the surety to protect him from loss, and he has no right to ask more, at the hands of the court, than that this shall be done; he has acquired no right by a contract to hold any particular person liable, provided the court will substitute another, who can equally protect him, from loss.

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This question has been thus adjudicated in England, and all the states of the union, where it seems to have been made; at least we have not been able to find an authority to the contrary. In England, when the testimony of bail is necessary, the party on application to the court, may substitute other in his place. *Collett vs. Jinnis*, R. T. Hardwicke, 133; *Pieety vs. Von Esch*. 1 Espinasse's Cases, 604; *Tidds Prac.* 264; 1 Starkie, 120, 135, 6.

In North Carolina, sureties for appeals have been released, in order to become witnesses, and others substituted in their stead. 2 Hay. 337; 2 Hawks, 336. The same thing has been done in Pennsylvania, 3 Serg. & Rawles Rep. 314; and in this case, the supreme court of the State of Tennessee, on a former hearing, likewise determined the same way, 7 Yer. Rep. 399.

2. It is said, that the charter of the bank of the State of Tennessee, is void, because the legislature of the State of Tennessee was prohibited by the constitution of the United States from granting it.

This would be a very grave question, and worthy of all consideration, had it not been already determined by the supreme court of the United States in favor of the power in the case of *Briscoe vs. The Bank of the Commonwealth*, 11 Peters, 257. We feel ourselves bound by that authority; and that it would be perfectly useless for us to determine otherwise, if such were our opinion, in as much as the supreme court of the United States can exercise a control over our decisions upon questions of this character,

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3. It is said, that the proof does not justify the verdict of the jury in the court below.

We have always said, that we will not scrutinize testimony in this court. The evidence of Clark shows, that when he presented the account to the plaintiff in error, he admitted that the items were correct, but said, that he did believe that he owed the Bank nothing, and that he had paid all he ever owed it. This of itself would be sufficient to sustain the verdict; for although, where a man admits the justice of an account, but contends, that he has paid it, all his statements must go to the jury; yet if he can give no reason for his belief, nor show anything in support of it, the jury are not bound to believe it, and may give judgment on the admission.—The evidence of Hobson shows that the plaintiff in error, having had the account upon which the suit is brought, in his possession for his revisal, in a few days afterwards, called at the bank, and claimed and obtained a credit for one Richmond's note, which had been overlooked by the bank, in stating the account; that he took no further exceptions thereto, and did not pretend to say that he had been charged with items, not justly due. This of itself is a strong circumstance against him.

Upon the whole, we cannot hesitate in saying, that there was testimony upon which the jury might act, and cannot therefore reverse upon this ground.

Affirm the judgment.

WHITESIDE vs. SINGLETON.

GRANT. Boundaries—Construction of calls. The most material and most certain calls control those which are less material and less certain. *Newcom vs Pryor*, 7 Wheaton, 7. Hence, where a grant calls for a certain number of poles to "a stake, *crossing the river*," the line must cross the river, though the distance terminates before reaching it.

SAME. Processioning—Surveyor's duty—estoppel—1806, c 1, § 21, construed. If a proprietor cause his land to be processioned pursuant to the act of 1806, he is estopped from claiming otherwise than according to the processioning. But the act does not authorise the public surveyor to procession and re-mark a man's land without his consent. He is only made the agent to survey and mark at the request of the owner, in reasonable conformity with the calls of the grant; and if he refuse so to make the survey, the owner may put a stop to the processioning; and if the surveyor, notwithstanding the owner's dissent, proceed to complete the survey, according to his own views, it is binding on no one.

SAME. Same—acquiescence. Quære, what acquiescence in a processioning thus made by a surveyor, will bind the proprietor?

LIMITATIONS. Deed founded on a void or voidable decree in chancery. Seven years possession of land under a deed, though founded on a void or voidable decree in chancery, will perfect the title of the possessor.

The State of North Carolina, by patent, 235, dated June 27, 1793, granted to John Gray Blount and Thomas Blount, 5000 acres of land, "on both sides of the two main forks of Duck river—beginning opposite to the mouth of the Wartrace fork, at a black walnut, a plumb-tree and a hickory,—also, a flat stone, set up by the black walnut, marked G. B., J. C., T. P., and J. D.; running thence west, 694 poles to a stake, *crossing the river*; thence east, 894 poles to a stake, and thence north, 894 poles, crossing the south fork, to the beginning."

The grantees, by deed, dated October 19, 1794, conveyed this tract, among other lands, to David Allison, who, by his deed, dated August 1, 1795, mortgaged it, with other lands, to Norton Pryor, of Philadelphia, to secure the payment of his promissory note of the same date, drawn in favor of Pryor or order, at ninety days, for \$21,800. Allison having died without paying this debt, Pryor filed his bill in the district court of the United States for the district of West Tennessee, against Allison's heirs and devisees, who, being *non-residents*, were made parties by publication;* and, at

* And consequently, the decree was void. Cooke's R. 49. 6 Yer. 473. 2 Yer. 484. 1 Stark. Ev. 258.

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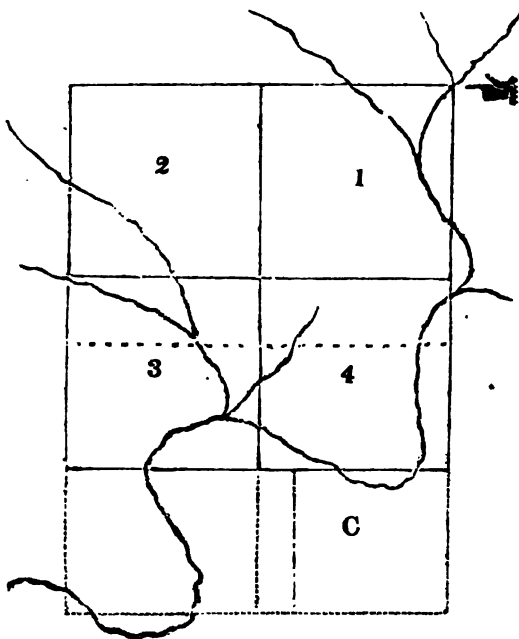
October term, 1801, a decree was pronounced that the defendants should pay the money, by the 28th of January, 1801; otherwise the mortgage should be foreclosed, and the marshall of West Tennessee, after sixty days notice, should sell the land. It was accordingly sold by the Marshall, April 19, 1802, at auction; and Andrew Jackson became the purchaser, who gave to the Marshall a power of attorney, dated June 25, 1802, to convey to John Overton and Jenkin Whiteside; which was done by deed, dated July 13, 1802.

Overton and Whiteside caused the land to be divided into four lots, by running lines north and south, east and west, through the centre of the tract. The lot in the north east corner was numbered 1, that on the north west corner, 2, that in the south west, 3, and that in the south east, 4. By deed of partition, dated May 1, 1807, reciting the boundaries as described in the patent, they mutually bargained, sold and relinquished to each other, lots 2 and 4 to Whiteside, and 1 and 3 to Overton.

Early in 1808, Overton applied to Malcolm Gilchrist, the deputy surveyor of the second district, to procession the whole tract, according to the 21st section of the act of 1806, ch. 1. Gilchrist, accompanied by Overton, began the survey; but on running the western boundary, they differed in opinion as to the place at which that line should terminate. Gilchrist, believing himself bound to stop at the end of the distance, 894 poles, called for in the grant, would not extend the line, as Overton insisted he should, more than a mile, so as to cross the river,—the grant calling for crossing the river to a stake, as the south west corner of the tract. The survey was therefore suspended, and Gilchrist and Overton went to the principal surveyor of the district for his instructions. He directed the deputy to terminate the line at the end of the distance called for, without regard to the call for "*crossing the river.*" Overton expressed dissatisfaction with these instructions, and did not return to superintend the rest of the survey, which Gilchrist, nevertheless, proceeded to complete, marking the lines as represented by the black lines in the annexed diagram. He also, at the same time, ran and marked the dividing lines between Overton and

Whiteside; and made return of his proceedings to the county register's office, where they were registered, and also to the principal surveyor's office, where they were laid down on the general plan of the district, on which, grant 235 is represented as a square, its western boundary as stopping before it reached Duck river, and its southern boundary as crossing the river nearly as on the annexed diagram.

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Twelve or eighteen months after this survey, and the first time after it, when Whiteside saw him, he directed Gilchrist to extend the western boundary of the tract, so as to cross the river, and also its other lines, and those of the partition, in the manner represented by the dotted lines in the diagram. It was done, and these lines were also marked.

The lines of the processioning survey include fully 5000 acres, and the extended lines, a surplus of 1800 or 1900 acres.

Three of the brothers of David Allison, for themselves, and one of them as administrator of Peggy Allison, one of

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his sisters, by their deed of August 3, 1812, relinquished to Andrew Jackson, all lands and other property in Tennessee, to which they had claims as heirs of David Allison.

On the 15th of November, 1824, Jackson and Erwin, surviving partners of Kirkman, Jackson and Erwin, recovered a judgment, in the circuit court of Davidson, against Thomas Whiteside, administrator of Jenkin Whiteside for \$7,049 23 cents, besides costs. The plea of fully administered was found in favor of the defendant in that suit; and the plaintiffs, on the 31st of January, 1825, issued a *scire facias* against Jenkin Whiteside's heirs, to subject his real estate to the satisfaction of the judgment. At May term, 1826, judgment was rendered against the heirs,—of which judgment an execution came into the hands of the sheriff of Bedford, which was levied upon lots 2 and 4 of the land in question, being Jenkin Whiteside's interest therein. It was sold by the sheriff of Bedford, on the 13th of January, 1827, to Thomas Whiteside, to whom the sheriff made his deed therefor, on the 10th of November, 1828.

On the 14th of June, 1828, the state of Tennessee granted to Robert and Clement Cannon, 698 acres and 127 poles, designated on the diagram by the letter C. This grant was founded on an entry made on the 9th of April, 1827, at one cent per acre, pursuant to the act of 1823, c 49. The greater part, if not all the residue of the land south of the black lines, was appropriated by Newton Cannon.

Jenkin Whiteside, in his life time, and his heirs, after his death, had possession of the *locus in quo*, south of the processioning southern boundary, from the spring of 1813 until the fall of 1827, when Dolly Singleton obtained possession thereof, claiming under Robert Cannon, which possession she held till the 9th of May, 1829, when this action of ejectment was commenced against her in the circuit court of Bedford. The plaintiffs declared upon a demise in the name of Thomas Whiteside, and also upon a demise in the name of the heirs of Jenkin Whiteside. At June term, 1829, Newton and Robert Cannon were admitted co-defendants with Singleton, and all the defendants entered into the common rule, and pleaded not guilty.

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At December term, 1830, the cause was submitted to a jury, who found a verdict for the plaintiffs, and they had judgment. The defendants appealed to the supreme court; by whom, at March term, 1833, the judgment of the circuit court was reversed, and the cause remanded for a new trial. It was tried at August term, 1836, before his Honor Judge DILLAHUNTY, of the 8th circuit, sitting instead of his Honor Judge ANDERSON, of the 5th circuit, and a jury of Bedford county.

The evidence submitted to them was that of which the above statement is an abstract, except the mortgage from Allison to Pryor, and the decree of foreclosure pronounced thereon, and that part of Gilchrist's deposition which details Overton's refusal to acquiesce in the processioning, which were offered by the plaintiffs, but rejected by the court.

His Honor charged the jury substantially—

That the conveyance from some of Allison's heirs operated to transfer their interest and no more, and would not enable the plaintiffs, if they claimed under it, to recover the whole tract. That the marshall's deed passed no title to Overton and Whiteside, unless shown to be founded on a judgment or decree. Nevertheless the power from Jackson to the marshall would authorise him to convey to Overton and Whiteside whatever interest Jackson had in the land under such judgment or decree. That the sheriff's deed to Thomas Whiteside conveyed to him all the interest of the heirs of Jenkin Whiteside.

That the processioning, made by a lawful surveyor, at the instance and request of the claimants, was binding on them; and if M. Gilchrist was a lawful surveyor, the processioning made by him in 1808, was binding on Overton and Whiteside, and those claiming under them, and estopped them from claiming any lands, south of the southern boundary of the processioning survey, which was to be regarded as fixing the southern boundary of grant, 235.

That it was not competent for the claimants, after such processioning, to alter or change it, by extending the lines across Duck river or otherwise.

That a surveyor, being a public officer, will be presumed

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in law to do his duty; and, if of his own accord, and without the request of the claimants, he run land out, and make his return, and it is registered, according to the 21st section of the act of 1806, c 1, it would conclude the claimants, their heirs and assigns; and, in this case, would estop Overton and Whiteside from claiming lands beyond the lines so established.

The plaintiff asked the court to charge the jury, that the grant to the Blounts should have been so surveyed, as that the western boundary should extend across the river, and that the grant, on its face, uninfluenced by the processioning would hold the land so surveyed. That if the lessors of the plaintiff and their ancestor had held seven years undisturbed possession, under deeds purporting to convey the fee, such possession perfected the claim to the land which was covered by the grant, and vested them with a legal title, notwithstanding they had been unable to show a regular chain of conveyances from the grantees to themselves. That it was competent for Whiteside to disclaim the processioning made by Gilchrist, and the boundaries thereby made, and hold according to the natural objects called for in the grant. That he had a right to re-mark his boundaries in reasonable conformity with the calls of the grant, and it would be a valid establishment of his boundary, though it might not correspond with the processioning.

The defendant requested the court to charge the jury, that the marshall's deed to Overton and Whiteside, not being founded upon any decree or judgment, conveyed no title to the purchaser, whether that purchaser, under the circumstances of the case was Overton and Whiteside or Andrew Jackson: that the power from Jackson to the marshall did not operate as a conveyance from Jackson to Overton and Whiteside, nor did it create the relation between them of vendor and vendee, nor any privity whatever, nor cause the title subsequently acquired from Allison's heirs by Jackson to inure, by relation to the marshall's deed, to Overton and Whiteside: and that, unless a title was shown to exist in Jenkin Whiteside, the deed of the sheriff of Bedford to Thomas Whiteside, vested him with no title.

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That though, before the processioning, the grant would have been surveyed so as to extend the western boundary across the river, yet after the processioning, the party could not so extend the boundary, but was thereby estopped. But if he could, it must be in reasonable conformity with the grant, and it is not in this case, because the surplus included by the extended boundaries is excessive; and that no re-marking which contains more than ten per cent. above the quantity called for in the grant, is valid.

That if it appeared that the deed of partition between Overton and Whiteside did not extend beyond the limits of the processional survey, there was no title in severalty vested by that deed in Whiteside to the land beyond the boundaries of that survey; neither, in that case, would there be by the remarking, since it was made after the deed; and then Whitesides heirs could not maintain ejectment for the *locus in quo* without joining Overton, or those claiming under him.

That the object and effect of a processional survey, when made, was to fix the locality of the boundaries of grants. Consequently, if the *locus in quo* lies beyond the lines of the processioning, it is not covered by the grant, and was, therefore, not granted land till granted to Robert and Clement Cannon; and, in that case, no length of possession would avail the plaintiffs.

That if the *locus in quo* can be considered as granted to the Blounts, still the possession of the plaintiffs, anterior to the act of 1819, c 28, cannot be counted as forming any part of their prescriptive title, since the partition deed, if it do not cover the land, does not purport to convey a fee in the *locus in quo*,—and—

That a possession held by tenant will aid the landlord's defective title only to the extent of the lease, or actual occupancy of the tenant, and not to the extent of the landlord's title.

The jury found a verdict for the defendants, and a motion for a new trial being discharged, the plaintiffs appealed in error to the supreme court.

F. B. Fogg, for the plaintiffs in error, and plaintiffs below. The circuit court expressed the opinion to the jury, December 10.

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that the marshall's deed to Overton and Whiteside, and the power from Jackson passed no title. The character of that paper was such, that when Jackson was vested with the title of part of Allison's heirs, by the deed of 1812, it inured to Overton and Whiteside. Jackson was estopped, by the recital in the power to say, that nothing passed by the deed of the marshall. It is not material or necessary, however, to consider this point, if the court below erred, and the plaintiff's positions are correct upon the other point; and, on the other hand, if the court below was correct on the other points, this one will be unavailing. Unless the court erred in refusing to charge the jury upon the points requested by the plaintiffs, it would be useless to reverse the judgment upon the other questions made in the record. Therefore no other points will be noticed by the plaintiff's counsel.

The grant from North Carolina has received a judicial construction in the case of *Newsom vs. Pryor*, 7 Wheat. 5, (see also 4 Wheat. 445,) which is in conformity with the decisions of all courts as to boundary. This court will respect that construction. Then the State of North Carolina is *estopped* from saying that the line must not cross the river; for she, by her public officers, has decided that it does, and the processionary surveyor could not, by his survey, interfere with the natural boundaries of the grant. And when it is argued, that the plaintiffs are estopped by the processioning, from saying that the line crosses the river, it is answered, North Carolina is *estopped* by the grant from saying it does not; and *estoppel* against *estoppel* doth put the matter at large. No man can be *estopped* to alledge the truth when the truth appeareth of record. Co. Lit. 352, a; 3 Thomas' Co. 466, 467, 468, top paging; 1 John. R. 495, *Jackson vs. Hunter*.

There was no proof of acquiescence, as in this case, as reported in 5 Yerger.

WASHINGTON for the defendants. 1. The plaintiffs have deduced no title to themselves under the grant issued to John Gray and Thomas Blount.

The title being in Allison by the conveyance of the grantees to him, it is attempted to be shown that it passed from him

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to the plaintiffs—1. By the deed of his heirs to Jackson.
2. By the marshal's deed to Overton and Whiteside. At most, the first of these deeds conveys to Jackson only three fourths of the land, or the interest of the three brothers. And as the marshal's deed conveys nothing, because the sale made by him was not authorised by any judgment or decree, so far as appears in proof,—and as Jackson only sold to Whiteside and Overton the right to take his place as the highest bidder, at this unauthorised sale, so the title subsequently acquired by Jackson from Allison's heirs does not enure to Overton and Whiteside. Because the relation of vendor and vendee did not exist between Jackson and Overton and Whiteside.

But be this as it may, neither of these deeds covers the land unless the grant does, for all of them refer to the land by general description, not by particularising the boundary. And we contend that the boundary of the grant was uncertain until the making of the processional survey; and that survey fixed it, gave it locality, and determined that the land in dispute was not within it.

2. The deed of partition between Overton and Whiteside does not include the land in controversy. Its calls conform strictly to those of the processional survey. It does not call for the western boundary to cross Duck river, but to terminate at a stake 694 poles from its beginning. Hence Whiteside cannot be considered as ever having had any title to this particular land in severalty, even if it is covered by the deed to him and Overton. Therefore, the plaintiffs and Overton are tenants in common, and they can maintain no action of ejectment upon their separate rights of entry.

If that deed does not cover the land, any possession, therefore, held by Whiteside could not have been by deed, and thereof would not give effect to the statute of limitations.

3. The deed from the sheriff of Bedford to Thomas Whiteside does not cover the land in dispute. That deed conforms to the deed of partition in the description of the boundary. If it did, as it was made in 1828, possession held under it, would not avail under the statute of limitations.

4. It is not material now to inquire, as to whether the land,

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according to the calls of the grant, could, or could not have been so surveyed as to extend the boundary across Duck river. Because this court decided, when this case was before it, on a former occasion, 5 Yer. 22, "That the processional survey, when made, registered, and laid down on the general plan in the surveyor's office, operated as an *estoppel* against Overton and Whiteside, subsequently claiming beyond its limits. *Houston's heirs vs. Matthews*, 1 Yer. 116; *Houston vs. Pillow*, 1 Yer. 481; *Davis' lessee vs. Smith & Tapley*, 1 Yer. 496. *Clark vs. McElhanie*, *Brown vs. McLemore*, MSS.

The circuit judge rightly rejected that part of Gilchrist's deposition, which related to Overton's insisting that he should extend the western boundary across Duck river, when the processional survey was made. To admit it, would be to decide that the processioning is no *estoppel*; for if it be an *estoppel*, as this court has decided that it is, then the party whom it concludes cannot contradict it.

5. When the boundaries of an ancient survey are obliterated, or when its boundaries were not originally actually marked, the proprietor may, by his own private authority, designate them, provided it be done in reasonable conformity to the calls of the grant. But this mode of ascertaining boundaries cannot be resorted to, after the public method, by processioning has been employed, which, in fact is the act of the party himself, done through a public officer, under the sanction of law.

6. The only remaining and perhaps the most important question in the case, is, as to the statute of limitations.

1. The plaintiff seeks to make good his title by the statute; and though this is a novel spectacle, yet it is admitted that our statute of limitations have the double operation, first—of barring the plaintiff's remedy, secondly—of giving title by force of the possession. But here, the plaintiffs have not had the requisite length of possession. Their possession of the *locus in quo* did not commence earlier than 1813, after which, till the passage of the act of 1819, repealing that of 1797, a sufficient time did not elapse to give the effect to

the possession of creating title. Therefore possession under the act of 1797 will not avail the plaintiffs.

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2. This brings us to the question—whether the plaintiffs have title by operation of the act of 1819? By the terms of its first section, this statute can only operate where the land in controversy has been *granted* by this state or North Carolina. This land has not been so granted, except to the defendants. When the statute does operate, its operation is confined to “*the quantity of land specified and described in the grant, devise, deed or other assurance,*” under which the person claiming its benefit holds possession. The land in controversy is not “*specified and described*” in a grant, or in a deed, by neither of which is it comprehended. The statute requires that the muniment, under which the possession is held, must “*purport to convey an estate in fee simple, to the land specified and described in such grant, devise, deed, or other assurance*”—that is, to the identical land covered by the particular muniment under which the possession is held. But a deed in fee for land, the southern boundary of which terminates 894 poles from the northern boundary, does not purport to convey a fee to land which lies quite beyond that distance from the northern boundary. In other words, different things are not the same.

3. With respect to the operation of the 2d section of the act of 1819, it merely bars the plaintiff’s remedy. And the extent of the bar has been decided by this court to be commensurate only with the limits of the defendant’s actual occupancy. *Dyche vs. Glass’ lessee*, 3 Yer. 397. That is, when the defendant held possession without any title, as a mere trespasser.

TURLEY, J. delivered the opinion of the court.

The first question presented for the consideration of the court in this case is, whether the grant No. 235, from the State of North Carolina to John Gray, and Thomas Blount for five thousand acres of land, covers the premises in dispute. This grant calls to lie on both sides of the two main forks of Duck river, beginning opposite to the mouth of the Wartrace fork, at a black walnut, a plumb-tree, and a hick-

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ory, &c. running thence west eight hundred and ninety-four poles to a white oak, thence south eight hundred and ninety four poles, to a stake, crossing the river, &c. If in running the line south, the survey be stopped at the distance of eight hundred and ninety four poles, the land in dispute is not within the limits of the grant—but if the line be extended across the river, it is. This raises the question as to what construction shall be given to the grant. On the one hand, it is contended that the line must stop at the distance called for in the grant—on the other, that it must cross the river. This is not a new question, but one which has been before the courts frequently. We are not therefore called upon to make a new precedent, but to follow old ones. This question was presented to the supreme court of the United States, in the case of *Newsom vs. Pryor's lessee*, 7 Wheat. 7, and it was held, that a call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance, and that there is no distinction between a call to stop at a river, and a call to cross a river. Chief Justice Marshall, in delivering the opinion of the court, says, "The courts of Tennessee and all other courts, by whom cases of this description have been decided, have adopted the same principle and have adhered to it. It is, that the most material and most certain calls, shall control those which are less material and less certain." Many other decisions to the same effect might be adduced. We consider this sufficient, as the question is at this day hardly debatable. There is then no doubt but that the grant does cover the disputed premises.

2. It is contended, that though by the rules of construction adopted by the courts, the grant does cover the land in dispute, yet in the year 1808, John Overton and Jenkin Whiteside, to whom belonged the land covered by the grant of five thousand acres, caused the same to be proccessioned by Malcolm Gilchrist, a deputy surveyor of the second district, in conformity to the 21st section of the act of 1806, c 1, by which the third line, running south, instead of being extended across Duck river, in pursuance of the call of the grant, was made to stop at course and distance, three hun-

dred poles short of Duck river, and that having done so, they are bound thereby and are estopped from now claiming to hold the land which would be included by extending the line to the natural object called for in the grant.

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It is not denied that, where a tract of land has been processioned by its owner in pursuance of the provisions of the statute referred to, he is estopped from claiming otherwise than according to the procession; but it is denied, that in the case under consideration, any such processioning has ever taken place. This makes it necessary for us to inquire into the facts upon this question. It appears that John Overton, in 1808 or 9, went upon the lands with Malcolm Gilchrist, the deputy surveyor, for the purpose of making a procession of the same; that they commenced at the beginning, and ran the first line to the white oak called for, then the second, the course and distance, viz. 894 poles, at which point the surveyor stopped, and refused to proceed further; Overton contending that he should run on to the river in obedience to the express call of the grant; and not being able to agree upon this point, they stopped the survey and went to the principal surveyor, Wm. P. Anderson, for instructions; that Anderson directed Gilchrist to stop at the end of the distance of 894 poles called for, and Overton expressed his dissatisfaction with this result and refused to have any thing further to do with the processioning survey; that Gilchrist, without his presence or assent, proceeded to procession the land according to course and distance, disregarding the call for the river, and returned the plat and certificate of survey, which were received by the principal surveyor, and registered and laid down upon the general plan. It does not appear that Whiteside had any agency whatever in this transaction. Is this a processioning of the land according to the provisions of the act of 1806, c 1, § 21? We think most assuredly not. It is not pretended that a surveyor has it in his power under the provisions of said statute to procession lands, against the consent of the owner, and thereby force him to hold by lines, different from those called for in his grant—he is only made the agent to survey and mark at the request of the owner, in reasonable conformity with the original calls. If, upon applica-

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tion, he refuses to be governed by what the owner deems to be a reasonable conformity, and insists on running the lines differently, thereby depriving him of land included within his grant, he may refuse to have his land thus processioned, and thus put a stop to the re-survey. And if the surveyor will, (disregarding such dissent,) pertinaciously make the re-survey, according to his own views of propriety and correctness, it is a void act, binding on no one; and the rights of all parties remain the same as if the processioning survey had never been made. Such, we think, is the present case. Overton applied to have the tract of land processioned, he and the surveyor disagreed as to the distance to which the second line should be extended, he being clearly right, and the surveyor clearly wrong; notwithstanding which the surveyor refuses to run the line otherwise than according to his views as to the distance; upon which Overton declined having any thing further to do with the transaction, and left the surveyor without any authority from him for completing the re-survey: nevertheless this was done, and not in conformity with the calls of the grant, and greatly to the injury of the owners of the land. There can be then no pretence for saying, that this processioning and remarking was the act of the owners, it was the unauthorised act of the surveyor, and no *estoppel* can arise out of it.

But it is said, that Overton and Whiteside acquiesced in this re-survey, and that although they might not have been originally bound by it, yet they now are, by such acquiescence.

The question of what acquiescence will deprive a man of a portion of his estate, by making good an erroneous re-survey of his land, made without authority and originally void, is a very grave question, when it shall become necessary to determine it. We do not think that it arises here, because we think that there is no proof of an acquiescence on the part of Overton and Whitesides, nor any person claiming under them. The proof shows that the first time Gilchrist saw Whiteside, which was some eighteen months or two years thereafter, he expressed his dissatisfaction with the manner in which the land had been processioned and re-marked, and

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requested him to go back and extend the second line to the river, which he accordingly did, and also ran and marked the other two lines, in conformity therewith. Overton and Whiteside some short time thereafter, to wit, in the year 1813, took actual possession up to the lines, as thus last marked, and have held such possession by themselves and those claiming under them ever since openly and notoriously. Here then is no acquiescence.

But it is said, that this acquiescence is evidenced by a deed of partition made and executed between Overton and Whiteside, for the tract of land covered by the grant for five thousand acres, under which the premises in dispute are claimed. This deed of partition bears date, 1st day of May, 1807; and was executed several years before the processioning by Gilchrist heretofore spoken of. Its construction must therefore be in conformity with that which would have been given to the grant in relation to boundary, unless there be something upon its face which will compel the court to give to it a different construction; and we think there is nothing. The deed of partition having been executed before the re-marking by Gilchrist cannot be considered as having any relation thereto, or as being governed in any manner whatsoever thereby; and although, in describing the tract of five thousand acres, which was to be divided, it is merely said to lie on both sides of Duck river, without calling for the river, as the termination of the second line, yet we know not, upon what principle this can be held a waiver of any rights secured to them by the grant: that it is no acquiescence in a survey made afterwards, is too obvious to require argument; that it can amount to no *estoppel* to claiming to the legal limits of the grant, cannot be contended for with success. A deed of partition is an *estoppel* between the parties to the deed, but no further; that is, either party is estopped from denying the partition as made by the deed; but we are at a loss to know upon what principle they are estopped by the deed, from claiming from the state more land than may be contained in the deed, if there be more justly belonging to them. It cannot be pretended that, if more be divided than they have title to, the state is estopped from

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controverting their right; and the first principle of an *estoppel* is, that it must be mutual. Then even supposing, that the deed of partition did not divide all the land covered by the grant, the only consequence will be, that there remained a balance undivided, which was held in common by Overton and Whiteside, subject to a subsequent division, which was afterwards made by Gilchrist under the direction of Whiteside, when the lines were extended to the river, in which Overton acquiesced, each party taking possession and holding accordingly.

It is possible that it may have been considered that Overton and Whiteside were estopped, because Gilchrist, at the time he proceSSIONED and re-marked the land, also divided it between them in accordance therewith; but the same course of argument which proves that they were not bound by such proceSSIONING and re-marking, also equally proves that they were not bound by his division.

We do not consider that in the view we have taken of this branch of the case, we have unsettled any principle heretofore determined by our courts, or established any new doctrine endangering the stability of the land titles of the state. We merely assert what we apprehend has never been denied, that the act of 1806, c 1, § 21, was not intended to authorise, nor does it authorise a surveyor to proceSSION and re-mark a man's land without his consent. This same case was before this court in 1833, and is reported in 5 Yer. 18. To the decision, as then made, we take no exceptions, but give to it our unqualified assent, although in its result, different from the present; but the case was then presented upon a very different state of facts from what it now is. Judge Catron, who delivered the opinion of the court, assigns the following as the facts upon which it was founded—"That on opening of the Duck and Elk river county, the five thousand acres belonged to John Overton and Jenkin Whiteside. In February, 1808, they caused it to be proceSSIONED by Malcolm Gilchrist, a deputy surveyor of the second district, in conformity to the 21st section of the land law of 1806. This survey was made with uncommon particularity, the first corner at the mouth of Wartrace fork of course was found, then running west, the

white oak corner was found. But this was all the marking, save some poles west from the beginning, a marked line was found. Gilchrist ran south, marked the western boundary plainly, and made the south west corner upwards of three hundred poles short of Duck river, then ran east and marked the southern side of the tract, and made the south east corner; then north to the beginning, marking the south east side. This done he proceeded to partition the tract between Overton and Whiteside, according to a covenant between them and by their consent. The boundary seemed to be settled and was recognised as a true one by Whiteside and Overton, until sometime about 1816 or 1818, when Whiteside claimed the second line to run across Duck river."

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It only requires a statement of the facts as they were said to exist, and as they are now presented to the court, to see upon what a different foundation the case rests now, from what it did then. Then it is said, that Overton and Whiteside caused the land to be processioned by Gilchrist—now, it appears that Whiteside had no agency whatever in the transaction, and that Overton so soon as he ascertained that Gilchrist was determined to make the procession at variance with the calls of the grant, refused to have any thing more to do with it. Then, it is said, that Gilchrist proceeded to partition the tract between Overton and Whiteside by their instruction—now, it is obvious that his partition was made, without any such instruction. Then, it is said, that the boundary as made by Gilchrist was recognised by Overton and Whiteside until 1816 or 1818—now it is manifest that so soon as Whiteside saw Gilchrist after the tract had been processioned by him, he expressed his dissatisfaction and directed him to extend the lines according to the calls of the grant, which was done; and in 1813, both he and Overton took possession of the land up to the lines as then extended.

The case of *Clark's Lessee vs. McElhanie*, goes no further than the case in 5 Yer. which has just been commented upon, the court holding that Clark could not disaffirm his own survey, and go to his old corner to the prejudice of a subsequent enterer. And, in the case of *McLemore vs. Brown*, it was only held upon this point, that in as much as the Legislature

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by the act of 1819, c 1, had authorised the surveyor of districts, in the case of the neglect of owners of granted lands in the Western Division of the State, to procession their lands and lay them down on the general plan, to do so for them; and that when this was done the owners might claim to the bounds re-marked against the state, and a subsequent enterer, —although they might be variant from the original lines, which could be established by proof;—and this, the more especially, as the same act prohibited the reception of entries for land within the limits thus re-marked. We therefore hesitate not to say, that there is no case within our knowledge, conflicting with the views expressed in this opinion.

3. But it is said thirdly and lastly, that the lessors of the plaintiff have not title to all the lands in dispute, unless it be by the operation of the statute of limitations. This is true, in as much as they have to deraign title through David Allison, the vendee of the grantees, and have only produced deeds of conveyance from a portion of his heirs. But it is deemed unnecessary to enter minutely into an investigation of this point, in as much as we are satisfied that the title of the lessors of the plaintiff has been perfected by the operation of the statute of limitations. It is proven that possession of the disputed premises was taken by Jenkin Whiteside in 1813; and that, the same was continued more than seven years by himself and those claiming under his title. At the time this possession was taken, John Overton and Jenkin Whiteside claimed title to all the land within the limits of the grant, by virtue of a deed of conveyance from Robert Hayes, Marshall of West Tennessee, bearing date 12th July, 1802. It is true that this deed of conveyance is founded upon a decree against David Allison, which is either void or voidable, (it is unnecessary to determine which;) for, inasmuch as the deed purports to convey all the land within the bounds of the grant, referring to it by number—and, in as much as we now determine, that the premises in dispute are covered by the grant, it follows, according to all the decisions, either on the statute of limitations of 1797, or on that of 1819, that possession under the deed for seven years will perfect the title, though it be founded on a voidable or void decree.

From this view of the case, it will be seen, that we think the charge of the circuit Judge, on the several propositions discussed in this opinion, is erroneous. The judgment will therefore be reversed and the case remanded for a new trial.

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UNION BANK vs. LOWE.

PRACTICE. *Judgment—inferior jurisdiction—presumption—bill of exceptions—note filed by justice, when part of record.* The judgment of an inferior jurisdiction will not be reversed because the record does not show the evidence upon which it was founded. It will be presumed that there was sufficient evidence to support it. The want of evidence to sustain the judgment must be shown by a bill of exceptions. A note though filed by the justice is not part of the record, till made so by a bill of exceptions.

SAME. *Same—distringas—corporation.* A justice of the peace in Tennessee cannot issue a *distringas*, and so cannot enforce the *appearance* of a corporation; but he may render judgment against a defendant for *want of appearance* to his *summons*—and this, as well in the case of corporations as of natural persons; and therefore he has jurisdiction of the person of a corporation by *summons* alone. *Aliter* in England and New York, where there must be an appearance of the defendant before judgment, and where because an appearance cannot be entered by the plaintiff for a corporation, its appearance must be enforced by *distringas*. 2 Archbalds Pr. 106.

SAME. *Appeal*—1823, c 54, § 3. A justice is an inferior jurisdiction in the sense of the act of 1823, authorising judgment on affirmance for twelve and a half *per cent. per annum*, in addition to the judgment of the inferior jurisdiction.

SAME. *Service of process by deputy sheriff.* A deputy sheriff may serve process issued by a justice. There is no law directly conferring the power; but the usage has long prevailed, and several statutes recognise it. 1794, c 1, § 52, 56; 1801, c 7, § 5; 1825, c 66, § 1; 1827, c 35, § 4.

The fifteenth of the fundamental articles of the Union Bank of Tennessee provides as follows—"The said Corporation shall not at any time suspend or refuse payment of any of the notes, bills, or obligations thereof; nor of any money received upon deposit in said bank, when demanded by the holder or depositor, at the place where the same is made payable, in gold or silver; and in case of such refusal, the holder of such note, bill or obligation, or the person or persons entitled to receive such money as aforesaid, shall be respectively entitled to recover interest from the time of such demand and refusal, at the rate of *ten per centum per annum* until paid."

During the late general suspension of specie payments by

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the banks throughout the United States, Lowe presented at the counter of the Union Bank, five bills of twenty dollars each, and four of one hundred dollars each, issued by it, and demanded payment in specie, which was refused. In consequence of this refusal, he sued the Bank before Mr. Justice Hall, of Davidson, by *summons* upon the twenty dollar notes, on the 9th of February, and upon the one hundred dollar notes, on the 2d of April, 1838. In the former five cases, the process was served on the president and cashier by a constable, and in the four latter, by the deputy sheriff of Davidson. His worship rendered judgments against the Bank in each case, and it appealed to the circuit court. The appeal bonds were executed by Thomas Washington, John Sommerville, and James Woods, in the former cases, and in the latter, by the two gentlemen first named and W. S. Pickett.

In the circuit court, at May Term, 1838, on the motion of the counsel for the Bank, these nine cases were consolidated into one, and continued. At October Term, the counsel for the Bank moved to "quash the proceedings in the cause had before the justice of the peace who rendered the judgments below, upon the following grounds. 1. That as relates to four of the cases, the original process or summons appeared by the return of service thereon, to have been executed by the sheriff by his deputy, when the said process or summons was issued by a justice of the peace, and was only directed "to any lawful officer." 2. That a justice of the peace has not jurisdiction of a suit, such as this is, against a corporation. 3. That the judgments entered up in each of the cases by the justice, which are here consolidated into one suit, were void for uncertainty." The court overruled this motion, and a jury being sworn found a verdict as follows—"that they affirm the judgment given in said nine cases by said Justice Hall; and that they find for the plaintiff \$ 502 24 cents, being the amount of the judgments rendered in said nine cases in favor of the plaintiff against the defendant by said Justice Hall, together with his costs." Upon this verdict the following judgment was entered. "It is therefore considered by the court that the plaintiff recover against the

defendants, and against Thomas Washington, John Somerville, and W. S. Pickett, their sureties in appeal, said sum of five hundred and two dollars and twenty-five cents, the amount of the judgments in said nine cases, and interest thereon from the 10th day of February, 1838, on one hundred dollars of said judgment, and interest thereon, on four hundred and two dollars and twenty-four cents, the balance of said judgment, from the 4th day of April, 1838, at the rate of twelve and a half *per cent per annum*, up to this day, together with his costs by him about the prosecution of his said nine suits before the justice, and the costs of said suits in this court, and that he may have his execution, &c."

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The defendant appealed in error.

WASHINGTON, for the plaintiff in error, said, 1. There is not a particle of evidence in the record, from beginning to end, to show what the cause of action was in this case, or what the verdict of the jury was founded upon. The judgments of the justice were entered upon the back of the summonses, and are thus, "judgment for the plaintiff \$21 50 c.," with a variation as to the amount in each case. No note was filed with him, nor sent up to the circuit court by him, so far as appears from the record; and, for aught that does appear, not only the judgments of the justice, but the verdict of the jury, were entirely arbitrary, without any evidence or cause of action whatever.

No cause of action appears to support the judgment, and be extinguished by it, and therefore the judgment is undoubtedly void for uncertainty.

2. A justice of the peace has no jurisdiction against a corporation. The Bank did not appear in this case, or submit to the jurisdiction. The process to compel the appearance of a corporation, is first by summons, and then by *distringas*. A justice has no jurisdiction to issue a *distringas*, nor to dispose of the property distrained, and therefore it never was intended, that justices should be invested with a jurisdiction, which they could not exercise effectually. *Hotchkiss vs. Religious Society of Homer*, 7 Johnson, 356; *Ministers &c. vs. Adams*, 5 Johnson, 347; *Lynch vs. Mechanics Bank*, 13 Johnson, 127.

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3. The summonses, in four of the cases issued by, and returnable to, the justice, were executed by the deputy sheriff, in his capacity of deputy sheriff, and not by a constable. The deputy sheriff has no authority to execute process in a civil cause before a justice. Act of 1779, c 5; Constitution of Tennessee, art. 6, § 15.

4. There was no authority to enter up judgment for twelve and a half per cent. interest from the date of the justices judgments. Such damages are not recoverable, pending an appeal from a justice; but only pending an appeal from county to circuit court, or from circuit to supreme court.

5. The judgment is erroneous in being entered up against W. S. Picket, for the whole amount of the nine cases, thereby making him liable in five of them in which he was not surety, and also in not having been entered up against James Woods at all, when he was surety in five of them.

E. H. EWING, for the defendant in error, insisted that the decision of the court below on the motion to quash was correct.

1. A deputy sheriff is a lawful officer, and is competent to serve process issuing from a justice of the peace: 1st the sheriff is such, he is an officer for the execution of process, and no law confines him to a court of record—no law directs that justices of the peace shall direct their process to any particular officer authorised to serve process. Several laws recognise the sheriff as an officer who shall serve process issuing from justices. Act of 1794, c 1, § 52, 56; 1801, c 7, § 5; 1825, c 66, § 1; 1827, c 35, § 4. If he can serve, of course he can give a deputation, as his power of giving deputations is (in the absence of any restraint) of course co-extensive with his office. Besides, a deputy sheriff is from other considerations a legal officer to execute this process. See Act of 1827, above referred to. Act of 1829, c 41, § 2.

2. The justice had jurisdiction of the causes. If he had not, no court had, of the five first for \$20 each. Jurisdiction of the circuit court being taken away by act of 1835, c 5, § 7, and they have no jurisdiction below fifty dollars. He had jurisdiction by the act of 1835, c 17, § 1, which

Act uses the words *all* debts and demands, &c. The argument is, that the justice could not compel an appearance, nor could he in any case. All our proceedings in this state are by summonses. A summons, the regular mode against a corporation was used here—no *distringas* is necessary; besides the bank did appear, as will be seen by the appeal, &c. Where a *capias* was the leading and the only leading process, this might have been different; now there is no compulsory process on any one, for appearance, nor could a court of record use a *distringas* against a corporation, which with them would stand in the place of a *capias*. See the New York cases cited by Mr. Washington.

3. The judgments are as certain as they can be made.

4. The judgment in affirmance of the magistrate's judgments has correctly added to them twelve and a half per cent. from their respective dates. See Act of 1823, c 54, § 3.

TURLEY, J. delivered the opinion of the court.

There are several questions presented for the consideration of the court on behalf of the plaintiff in error. 1. It is said, that there is not a particle of evidence in the record to show the cause of action, or upon what the verdict of the jury was rendered. This is no objection, for if there were no testimony to warrant the finding of the jury, a bill of exceptions should have been filed in behalf of the Bank, showing that it was so. The presumption is always in favor of the judgment, and in the absence of a bill of exceptions, a court of errors must pronounce that it was rendered upon sufficient proof. The warrants are in the usual form "to answer the plaintiff in a plea of debt, under fifty dollars, due by note." And it never has been considered, that in such cases the note becomes a part of the record, though filed by the justice, until it has been made so by a bill of exceptions, in fact, it has been held, that it does not.

2. It has been said, that a justice of the peace has no jurisdiction against a corporation. This is true in all cases, where an appearance must be entered before a judgment can

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be taken; because a corporation can only be forced to appear by a *distringas*, which a justice of the peace cannot issue.

The practice of the common law courts of England, and of the courts of New York, from whence the precedents in favor of the proposition contended for, are drawn, is of this character. A judgment by default can only be taken for want of a plea, not for want of an appearance. This is not, nor has been, the practice of the courts of Tennessee.

Judgments by default have always been taken for want of appearance, as well as for want of plea. This practice applies as well to corporations as individuals; and therefore, there is no necessity for a *distringas* against a corporation, notice being sufficient to warrant a judgment against it, in default of appearance.

3. It is said, that a portion of the warrants were served by a deputy sheriff, who has no authority to execute process issued by a justice of the peace, and that the motion to quash for this reason ought to have been sustained.

To this objection there are two answers. 1. The objection only applies to a part of the warrants, not to the whole, and at the first term of the circuit court, to which the appeal was prosecuted, they were, upon application of the Bank, consolidated into one case, and the case was continued. At the next term, the motion to quash for the cause assigned was made. This could only be done, by undoing what had been done at the previous term, at the request of the plaintiff in error, to wit, separating the suits which had been consolidated; it was too late to make the motion, the motion to consolidate had waved it.

2. We think deputy sheriffs have the right to serve process issued by a justice of the peace, and this, perhaps, more by long custom than by actual law. In England, the sheriff of the county is the head of the constabulary force; he appoints them, is responsible for their acts, takes bond from them to himself, hence the word bumbailiff, viz. bond-bailiff. This being the case, it necessarily followed, that he might serve any process, which his inferior agents might serve. This practice was no doubt introduced into North Carolina from England, and from North Carolina to Tennessee, al-

though the power of the appointment of bailiffs or constables was taken from the sheriff and vested elsewhere. And in confirmation of this supposition, although we find no law authorising a sheriff or his deputy to serve process, issued by a justice of the peace, yet we find laws, making them responsible for not doing so and making due return thereof.

4. It is said, there was no authority for the circuit court, to enter a judgment for twelve and a half per cent. damages upon the appeals from the justice of the peace.

We think that the acts of 1823, c 54, § 3, authorises this amount of damages. It says that in all appeals hereafter to be taken from an inferior to a superior jurisdiction, when the judgment of the inferior jurisdiction shall be affirmed, the plaintiff shall recover, in addition to the judgment of the court below, at the rate of twelve and a half *per cent. per annum* thereon, up to the time of the rendition of the judgment in the court above. The justice's court is certainly an inferior jurisdiction, and the circuit court a superior one.

5. It is said the judgment is erroneous in being entered up against W. S. Pickett, for the whole amount claimed against the Bank, when he was surety only for a part of the appeals. This objection is well taken, and the judgment must be reversed and rendered against the persons properly liable for the payment of the same.

THE STATE vs. CHERRY.

CRIMINAL LAW. *Recognizance—ambiguity—construction.* The grammatical connection of words as relative and antecedent will not be allowed to prevail to the destruction of the meaning of the sentence. Noy's 3d Maxim; Jenkins Cent. 180. Thus, where three persons, two of them of the same surname, entered into a recognizance, in the following order,—T. C. in the penalty of \$3000, and F. and G. Y. C., in the penalty of \$3000 jointly and severally, conditioned to be void if the said C. appeared: HELD, that by the scope of the paper, no ambiguity existed as to which C. was meant by the words, "said C."

SAME. *Sams.* Where the interpretation of an instrument is rendered obscure by a conflict of its grammatical construction with its scope and purpose, resort may be had to extrinsic evidence to determine the sense. Roberts on Frauds, 26, 27.

SAME. *Scire facias.* If a *sci. fa.* recite that certain justices by name returned a recognizance into the clerk's office, and that it was witnessed by them, these are sufficiently certain allegations, that the recognizance was acknowledged before them.

A state's warrant was issued by Isaac Dennison, a justice of the peace for Montgomery county, on the 22d of February, 1836, against Thomas Cherry, upon a charge of fraudulently having and keeping in his possession certain counterfeit coins. The defendant was thereupon brought before three other justices of Montgomery for trial on the same day; and they ordered him to enter into a recognizance for his appearance at the circuit court, to answer the charge,—himself in the penalty of \$3000, and two sureties in the penalty of \$3000, jointly and severally, or stand committed. He gave the recognizance and it was acknowledged first by the defendant, Thomas Cherry, then by David Fields, and lastly by Garrard Y. Cherry, and conditioned that the "said Cherry" should appear, &c., thus leaving a grammatical ambiguity as to which Cherry was meant by the words, "said Cherry." And the warrant and recognizance were filed by the justices in the clerk's office of the circuit court of Montgomery. At May term, 1836, the defendant was indicted for passing, and for keeping counterfeit coins. He failed to appear, and a forfeiture of the recognizance was taken and entered, and writs of *scire facias* were awarded against him and his bail. The writs were issued on the 23d of June, and returned at September Term, 1836, made known to the bail, and not to

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be found as to the defendant. An *alias* was issued for him, which was returned "not found" at May Term, 1837, when the bail appeared, and pleaded to the writs of *scire facias*, *nul tiel record*, upon which the Attorney General, TURNER, joined issue. At May Term, 1838, the cause was argued before his Honor Judge MARTIN, of the 7th circuit, upon the plea, which of course involved an inquiry into the validity of the recognizance; and also as upon a demurrer, taken at the bar, to the *scire facias*, involving the question of its sufficiency. His Honor took an advisement; and at May Term, the cause was again argued before his Honor Judge BARRY, of the eleventh circuit, who sustained the plea, and gave judgment—"that there is no such record as is set forth and described in the *scire facias* against the defendant, &c. The Attorney General appealed in error.

The portions of the recognizance and *scire facias*, which are necessary to understand the questions made in this count, are recited in the opinion of the court. But the principal question was as to the ambiguity in the recognizance.

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The Attorney General insisted, on behalf of the state, that it was competent for the court to look into the other portions of the record to obtain from them an elucidation of the obscurity in the phraseology of the recognizance, which was no more at any rate than a mere grammatical ambiguity. Roberts on Frauds, 27. He said, moreover, that the meaning of the parties to a recognizance, as well as to any other writing, was to be sought by all the ordinary means of interpretation. Mere grammatical construction was not to be followed to the subversion of this intent; but, on the contrary, was in no case to be resorted to, except where the other *indicia*, appearing in the body of the writing, failed to remove doubts as to the meaning of the parties; and most certainly was not to be allowed to raise doubts, where otherwise none could exist.

COOK, for the defendant in error, argued as to the sufficiency of the *scire facias*, that it was bad for the following reasons:—1. It does not show that the recognizance was taken before the justices who returned it into court. No person but a judicial officer had right or jurisdiction to take a

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recognizance, so as to make it a record on which a *scire facias* would lie, or on which the party could be called in court. Now, although they are stated to be judicial officers, it is not stated the acknowledgment was made before them, much less is it stated that it was made before them as justices of the peace.

2. It is not stated in what county it was taken. The words, said county, in the *scire facias* have no antecedent to which they can refer, and they are only used in reference to the warrant. There is no allegation in the *scire facias* that the recognizance was taken in the state, if it was taken by the justices.

3. The *scire facias* does not show for what offence the warrant against Thos. Cherry was, or that it was for any offence known to the law. It may have been for a misdemeanor, or it may have been for nothing; if so, then the justices would have no jurisdiction to take a recognizance in favor of the state to answer any charge.

4. It is not stated that the justices were justices of Montgomery county, or of the state.

He contended, that the recognizance was void for uncertainty, because it does not appear which of the two Cherry's before mentioned was to appear and answer the state. The words, the "said Cherry" applies as well to Garrard Y. as to Thomas Cherry, and Garrard Y. never was called to answer the state, but only to bring the body of Thomas Cherry. Indeed, by a fair grammatical construction, the word "said" refers to Garrard Y. Cherry, being the last antecedent of that name.

He cited *Bankhead vs. Saunders*, 2 Harris & Gill, 82; and the *Commonwealth vs. Daggett*, 16 Mass. R. 447, to show that the court cannot look out of the recognizance itself, to ascertain its meaning.

GREEN, J. delivered the opinion of the court.

December 17.

1. It is insisted by the defendants, that there is an ambiguity in the recognizance in this case, upon its face, which renders it void for uncertainty. It is in the following words: "Be it remembered, that on 22d day of February, 1836,

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personally appeared, Thomas Cherry, David Fields, and Garrard Y. Cherry, before us, acting justices of the peace, for the county of Montgomery, and acknowledge themselves to stand justly indebted to the State of Tennessee, that is to say, the said Thomas Cherry, in the sum of three thousand dollars, and the said David Fields, and Garrard Y. Cherry, in the sum of three thousand dollars, jointly and severally, to be levied of their goods and chattels, lands and tenements, but to be void if the said Cherry shall make his personal appearance before the judge of our circuit court," &c.

It is insisted, that we cannot perceive which of the persons, Thomas, or Garrard Y. Cherry, is bound to appear; that the words, "said Cherry," may refer to either, but do more grammatically refer to Garrard Y. Cherry, as the last antecedent.

It is true, that if there were nothing to control the application of the words, "said Cherry," they would grammatically refer to Garrard Y. Cherry, as the last one previously mentioned; but if from the whole instrument, we can satisfactorily perceive that they were not intended to refer to Garrard, but to Thomas, we are to construe the recognizance according to the intention of the parties, and not according to its grammatical sense. Thomas Cherry is first mentioned in the recognizance, and is bound in the sum of three thousand dollars; then Garrard Y. Cherry and Fields are mentioned in connection, and are jointly and severally bound in the sum of \$3000. We never see one of the bail entering into his obligation, and then the principal and the other surety coming forward together, and jointly agreeing to be bound. But it would be still more uncommon and absurd for one of the sureties to be bound in \$3000, and the other surety and principal jointly in only \$3000. But that both these unusual and incongruous facts should concur in the same recognizance is not to be supposed probable.

We must perceive, therefore, that the whole stress and scope of the instrument indicate that Thomas Cherry is referred to by the words, "said Cherry," so that the ambiguity, which it is contended that these words create, does not exist.

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But if it were not sufficiently clear, to enable the mind to determine with absolute certainty, the application of these words, from illustrations drawn from other parts of the instrument, yet as it must be seen, that those passages reflect a strong auxiliary light upon the words in question; they afford sufficient ground for the introduction of extrinsic evidence. *Roberts on Frauds*, 27.

But we do not think a reference to such evidence necessary. We are satisfied from the whole instrument that Thomas Cherry is referred to, and that he was bound to appear according to the recognizance.

2. Upon the demurrer to the *scire facias*, it is insisted that it is ill, because it does not appear that it was taken by persons authorised to take it. It recites that, "Whereas heretofore, to wit, on 23d day of February, 1836, James Wheatly, A. Rogers, and N. F. Trice, Esquires, justices of the peace for said county, filed in the clerk's office of the circuit court for said county, a warrant in the name and on behalf of the State of Tennessee, against Thomas Cherry, together with a recognizance, by which," &c. Then after reciting the undertaking of the parties, it uses these words, "which said recognizance, signed and sealed by said parties, and attested by said justices of the peace," &c.

The recognizance was signed and sealed by the parties, and attested by the justices, and by them delivered to the clerk with the warrant, upon which it is founded. These allegations make it certain, to a common extent, (which is all the law requires,) that the recognizance was taken before these justices. We are therefore of opinion the court erred in rendering judgment for the defendants, on the plea of *null tiel record*, and the judgment should be rendered for the state.

Reverse the judgment,

DYER vs. THE STATE.

NUISANCE. Retailing liquors defined. The acts of 1779, c. 10, creates "the offence" of unlicensed retailing of spirituous liquors, subjecting persons guilty thereof to a penalty of one hundred and twenty-five dollars,—and, defining it to be—1. The selling of them in smaller quantities than a quart.—2. The selling of them by the quart or greater quantity, to be drunk at the place where sold.

SAME. Same—made indictable. The acts of 1811, c. 13, and 1823, c. 33, make this offence indictable.

SAME. Repeal. These latter acts are repealed by the same acts of 1831, c. 80, and 1832, c. 34.

SAME. Repealing laws not revived. The repeal of the act of 1831 by the act of 1838, c. 120, does not revive the acts of 1811 and 1823, because those acts are also repealed by the act of 1832, which is not repealed by the act of 1838, the rule being that—"When a statute is repealed by several acts, a repeal of one or two of them, and not of all, does not revive the first statute." 12 R. 7.—Dwarris on Statutes, 676,

SAME. Same. Repealed laws may be referred to when. But if the acts of 1811 and 1823 were the only laws which define the offence of retailing, they, though repealed, might be referred to, to ascertain what is meant by the "offences of retailing," prohibited, but not defined, by the act of 1838. For it is a rule that—When it becomes necessary to refer to a repealed statute in order to define an existing offence, it may well be done.

SAME. Same. License laws repealed. The act of 1838, c. 120, however, operates virtually as a repeal of all laws authorising a license to retail spirituous liquors; because it makes all retailing, without exception, a misdemeanor, indictable and punishable by fine at the discretion of the Court.

SAME. Penalty of \$125. But, it seems, that the act of 1779 is not repealed, so far as it inflicts the penalty of \$125 upon persons selling by the quart or greater quantity, to be drunk at the place where sold. *Moore vs. The State*, 9 Yerger, 253, recognized.

STATUTES. Acts relate to their passage. When an act has been signed by the Speakers of both Houses of the Legislature, as it must be before it becomes a law,—Const. art. 2, s. 18,—it takes effect from its passage by relation; and if it be a repealing statute, it avoids an act done by authority of the repealed law, in the interval between its passage and signature.

On the 8th of February, 1838, the Grand Jury of Davidson indicted the defendant, for that, "with force and arms in the county aforesaid, on the 7th of February, 1838, unlawfully, a certain gill of spirituous liquors he did sell by retail to a certain Joseph Ryan, contrary to the form of the statute," &c.

At May term of the Court, the defendant appeared and pleaded not guilty, and issue was thereupon joined, and he was put upon trial.

The evidence was—

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'That the defendant, on the 7th of February, did sell liquors in a less quantity than a quart in said county, and received pay therefor; that on the morning of the 27th of January, 1838, the defendant had applied to the clerk of the County Court of Davidson for a license to retail liquors in the county; that the clerk informed him that he had understood that the Legislature had passed an act prohibiting such licenses; that he would take his name, and the day and time of his application,—and if allowed to issue such a license, he would consider the application as made, and would grant him one; that when said application was made, though the act in question had been passed by both Houses of the Legislature, it had not been signed by either of the Speakers: that subsequently, the clerk refused to grant the license;—that on the 6th of February, 1838, the County Court of Davidson had granted the defendant a license to keep tavern in said county, and sell liquors therein, for the term of one year from the 6th of February, 1838, which license was granted under the Act of 1823, and the previous acts on the subject of licensing taverns.

The license referred to was read in evidence, as follows:

“State of Tennessee, Davidson County Court,
February Term, 1838.

Whereas Isham Dyer has this day prayed, and obtained an order of the said County Court to keep an ordinary at his now dwelling-house in this county. These are therefore to license you, the said Isham Dyer, to keep an ordinary at your now dwelling-house in this county, for and during the term of one year, from the date hereof; you, the said Isham Dyer, in all things complying with the directions of the Act of Assembly, in such case made and provided. Witness Smith Criddle, Clerk of our said Court, at office, the 6th day of February, 1838:”

SMITH CRIDDLE.

It was also proved that the defendant's house was situated in Nashville, and was a large three story brick house; and this was all the evidence in the case.

The Court, RUMBLE Judge, charged the Jury, that the defendant had no right to retail, as a licensed retailer, from

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what passed between him and the clerk of the county court; for even if it was clear that the defendant was entitled to a license under the act of 1831, still he could not retail without actually taking the license; that the law dated on the 26th of January, was in force on the 27th, though not signed until after the license was applied for that day; and so the defendant was not entitled to take a license on that day under the act of 1831; that the license granted to the defendant by the County Court on the 6th of February, was void; and constituted no defence for him in the case, the act of 1838 having abolished all tippling-houses, except such as had been licensed before its passage: that (as to the principle insisted on, that the Jury were judges of the law as well as of the facts, and should find their verdict according to their own construction of the law, if they differed from the Court,) the jury are the exclusive judges of the facts; not so of the law. It is the duty of the jury to respect the opinion of the Court upon questions of law, and to be governed by it, unless they should think the Judge wrong;—in that case, it was their privilege to find their verdict according to their opinion of the law; that if the Judge erred in his view of the law, his error could be reversed in the Supreme Court; whereas if the Jury took upon themselves to decide the law against his charge, it could not be reversed if wrong.

The counsel for the defendant requested the Court to charge the jury, that if they entertained a reasonable doubt as to the meaning of the statute in this case, they ought to acquit the defendant. The Court refused so to charge.

The jury found the defendant guilty; and his motion for a new trial being over-ruled, the Court fined him ten dollars, and gave judgment against him for the costs. From all which he prosecutes this appeal in the nature of a writ of error. December 13.

FLETCHER for the plaintiff in error.

I. We take several exceptions to the charge of the Circuit Judge, and aver that he erred when he instructed the Jury:

1. That the license granted by the County Court of Davidson on the 6th of February 1838, was void, and constituted no defence for Dyer.

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2. And that he erred when he refused to tell the Jury that the said license was a sufficient authority to authorise Dyer to sell a gill of spirituous liquors.

I.—It is contended by the State, and was so declared by the Judge, that the act of 1838, repeals all laws authorising the retailing of liquors in a less quantity than a quart, and all laws authorising the granting of licenses to Tavern Keepers.

These positions are denied by the counsel for the plaintiff in error. We maintain that the act of 1838 repeals the whole of the act of 1831, c. 80, and “so much of the 4th section of the act of 1835-6, c. 14, as relates to the licensing, and increasing the tax on, those who retail spirituous liquors.

2. It is further contended by the State—and was so ruled by the Circuit Judge, that the act of 1837, c. 39, repeals all laws which tax tavern-keepers, or which require them to take a license. Now, a reference to this last mentioned act, will show that it refers expressly to a particular act, and no other. It provides that so much of an act passed 5th Feb. 1836, entitled “an act setting forth the property, real and personal, and the privileges and occupations liable to taxation in this State,” as imposes a tax on tavern keepers, or as requires such persons to obtain licenses, be and the same is repealed. The acts, then, of 1838 and 1837, apply expressly to the acts of 1831, c. 80, and 5th Feb. 1836, and 1832, c. 34.

The repeal of the acts of 1831 and 1832, and 5th Feb. 1836, leaves the acts of 1811, c. 113, and 1823, c. 33, in full force. And by the provisions of those statutes, the county courts are fully authorised to grant licenses to tavern keepers. And having granted a license to Dyer to keep an ordinary, that license was not void, and did constitute a good defence for him.

The court will see, by reference to the statute of 1793, c. 10, § 2, and 1832, c. 34, § 1, that tavern keepers, who have obtained licenses, are fully authorised to retail spirituous liquors in the very smallest quantities.

3. It is further contended by the State, that the 2d section of the act of 1838, c. 120, makes it an indictable offence in

any person, and under all circumstances, to retail spirituous liquors.

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But such is not the meaning of the section. By reference to the act of 1811, c. 113, the court will see that the last mentioned acts make it an indictable offence to retail liquors without license; and limit the fine, upon conviction, to a sum not less than one nor more than five dollars. Now, a bare inspection of the second section of the act of 1838, will show that that section is added for the express purpose of authorising the judge, upon conviction, to fine the defendant "at the discretion of the court, as in other cases of misdemeanor, and to repeal that portion of the second section of the act of 1815, c. 203, which limits the fine to five dollars." It is proper here to remark, that there is no act of 1815, c. 203, relating to the retailing of spirituous liquors. The legislature meant the second section of the act of 1811, c. 113. This view of the second section of the statute of 1838 is further confirmed by the language itself, of the section. It declares, "that all persons convicted of *the* offence of retailing spirituous liquors, shall be fined, &c." The language shews that "*the* offence" mentioned is *the* offence pointed out in the second section of the act of 1811. The second section of the act of 1838 creates no new offence, and authorises the court to increase the fine beyond the sum to which it had been limited by the act of 1811.

If the act of 1838 repeals the acts of 1811 and 1823; and, also, the acts of 1831, 1832, and 1836, then we certainly have no statute against retailing liquors, either with or without license; and it follows that no person can be punished for such retailing, since it was never indictable at the common law. I assume this position upon the ground that the second section of the act of 1838 does not make it an offence so to retail. That act creates no offence, defines no offence, but refers to "*the* offence" as something already known and existing. I further contend, that the reference to an existing and already defined offence, shows conclusively that the acts of 1811 and 1823 are in force, for "*the* offence" referred to can be found no where else but in those statutes.

There was another act passed at the last session of the Le-

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gislature, on the 27th of January, 1838, c. 169, which shows that that body considered that licenses, to retail spirits, were still to be had and used. The act referred to makes it penal for "*licensed* grocers" to sell spirits on Sundays. Would the legislature have embodied in its criminal code a new statute which was to die as soon as born? Why speak of "*licensed*" grocers if no licenses were hereafter to issue? It would be useless as respected the short period of time the licenses previously granted were to exist.

4. In the construction of doubtful statutes, I believe the established rule is, to endeavor to arrive at the intentions of the legislature. 6 Dane, 595, 596. By reference to the report of the special committee who presented this bill, it will be seen it formed no part of their plan to repeal the acts of 1811 and 1823. That committee, on the first page of their report, say—"With such a state of things, accompanied with a slight amendment of the laws regulating the manner of granting tavern licenses, your committee would at present be content." And on the last page they say: They, in conclusion, recommend the repeal of the acts of 1831 and 1835, authorizing persons to retail spirits; and an amendment of the existing laws so as to impose an increased fine upon all persons thereafter guilty of such offence. A bill in conformity with the foregoing views, is herewith reported, and its passage recommended." I contend that the act of 27th January, 1838, is in conformity with these recommendations—that it leaves in force the acts of 1811 and 1823—refers to the "*existing laws*" alluded to by the committee—that it creates no new offence, but merely gives the court power to levy an "*increased fine*"—and, consequently, that in the construction of the statute by the judge, there is error.

5. The circuit judge was in error when he refused to instruct the jury, that if they entertained a reasonable doubt as to the meaning of these statutes, still they ought not to acquit on that account.

1. A verdict of conviction is, formally, that we find the defendant guilty, in manner and form as charged in the indictment. In this case, Dyer is charged with selling a gill of spirits contrary to the form of the statute, in such cases made

and provided. The Jury comes into court and tells the judge: "We don't know what the statute means, we entertain doubts as to its purport." According to this portion of the judge's charge in the case, he would respond to the Jury—"You must still find him guilty, in manner and form as charged in the indictment, and that his acts are contrary to the provisions of the statute, although you don't know what the statute means—provided you are satisfied of the fact that he sold the gill of liquor." No one questions that if the jury entertain reasonable doubts as to the facts, they must acquit—that is, if they doubt whether the facts bring the case under the law, they must acquit—but though they may not be satisfied that the law covers the facts, they must convict. 6 Dane, 688, § 16.—590, § 35.

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5. "The Court explained to the jury, that if the judge erred in his views of the law, his error could be reversed in the Supreme Court; whereas, if the jury took upon themselves to decide the law different from the charge, it could not be reversed, if wrong." I think this part of the charge was calculated to have, and did have, an undue influence upon the mind of the jury. See 5th Yerger, *Garner vs. the State*, at page 179,—the two concluding paragraphs of Judge White's Opinion.

6. But, suppose I am mistaken upon all the foregoing points—that the act of 1838 repeals the acts of 1811, 1823, 1831 and 1835, still I contend, that the defendant was wrongfully convicted; and that inasmuch as Dyer applied to the clerk for a license before the act of 1838 was signed by the Speakers, as between him and the State, from what passed between him and the clerk, he is to be considered as having obtained a license under the act of 1831, before the act of 1838 became a law. This brings up the question when an act becomes a law in Tennessee. By the Constitution of Tennessee, Art. 2, § 18, "No bill shall become a law until it shall be read and passed on three different days in each House, and be signed by the respective Speakers." See also 6 Dane, 687; 1 Dane 541; 5 Dane, Art. 6, p. 247. Then, when Dyer applied to the clerk the act of 1838 had not become a law; consequently, the act of 1831 was then in

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force. The court has said, that upon proper occasions, it will look to the very hour of the day when a thing was done. 4 Yerger, 270.

But it may be said, that though Dyer applied for the license, before the act of 1838 became a law, still as he did not actually obtain the license, that application avails him nothing. The act of 1831 provides, that "any person wishing to retail spirituous liquors is hereby authorised to APPLY to the clerk of the county court for a license for that purpose; and such clerk is hereby authorised and required, to issue to such person so applying, a license, &c." Here, Dyer did all that the law required of him; and when the agent of the State, which is the State itself, did not do what he was "required" to do, can the State charge that man with an infraction of *its* laws. There is a material distinction between a case when the State is prosecuting an individual for an infraction of its laws, and the case of two individuals who are contending for some private right. If the State prevents the man from conforming to the law, can the State punish him for a breach? It may be said that Dyer had modes of redress—a suit for damages, and coercion by means of a mandamus. So, perhaps, he had. But his leaving these private modes of redress do not affect the question of the right of the Government to punish him for not obtaining that which the State prevented him from obtaining. But I maintain that he had a license under the act of 1831. The evidence shows that the clerk told him, "he considered the application as made, and he should have one," if allowed by law to issue it. If the act of 1838 was not then in force, he was authorised to issue one. It is not the mere issuance of the paper, called a license, that gives the privilege. A man may have a license, and yet have no such paper. That paper would only be an evidence that he had the privilege. It is not the commission, the parchment, that makes a man an officer. The commission is only a convenient evidence that he is an officer. It has been decided that where a person's license expires between the times of the meetings of the commissioners empowered to grant it, such person is not liable to indictment for selling liquors during that intermediate period, because the Govern-

ment had put it out of his power to get the license. See 2 Johnson's Cases, 346.

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The ATTORNEY GENERAL, on behalf of the State, argued in the first place, that the act of 1838, c. 129, in itself, irrespective of all other enactments upon the subject, forbids the retailing of spirituous liquors, because it inflicts a penalty for doing the act, denominates the act a misdemeanor, and makes it punishable as such, and hence the thing is unlawful, although there are in the act no prohibitory words. Dwarries on Statutes, 678, marginal page.

In the second place, he said that by repealing the act of 1831, c. 89, the legislature had not revived the act of 1823, c. 33, because the act of 1823 had been repealed by the act of 1832, c. 34, as well as by the act of 1831, and a repeal of one or two repealing acts, and not of all, does not revive the first statute. 12 Rep. 7; Dwarries on Statutes, 675. He insisted that a statute is repealed either by implication, (where the provisions of a new statute are inconsistent with those of an old one upon the same subject,) or expressly. But there is nothing in the act of 1838 which conflicts with the first section of the act of 1832, c. 34, and that statute not being mentioned in the act of 1838, it follows that only such parts of it are repealed by implication as are inconsistent with the provisions of the act of 1838. That part of it which relates to granting retailing licenses is repealed, because the act of 1838 expressly annuls the authority to grant such licenses. But the part of it, namely, the first section, which prohibits retailing without license, corresponds with the purview of the act of 1838, and it consequently stands in force, a substantial prohibition of unlicensed retailing. And the authority to license being destroyed, there can be no retailing. So that as the laws now stand, applying to them the same principles of argument pressed for the plaintiff in error, the act of 1832 prohibits retailing without license, and the act of 1838, after declaring that license shall not be granted, prescribes the punishment which shall be inflicted on a party guilty of that "offence;" namely, that he shall be punished as for a misdemeanor. Therefore the doubt which has been insisted upon in the argument, occasioned by the want of prohibitory words

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in the act of 1838, is removed by the first section of the act of 1832, which is expressly prohibitory. And he said that that prohibition was as complete as if it had been inserted in the act of 1838, as one of its sections. He also contended that the act of 1832 was emphatically designed to repeal the acts of 1811 and 1823, because it prohibits public house-keepers, as well as other persons, from retailing, without taking out the license provided by the act of 1831; whereas by those statutes public-house keepers could retail under the authority of their ordinary license, as an incident to the occupation.

E. H. EWING in reply, insisted that the act of 1836 contained no prohibition of retailing: that the act of retailing in itself was indifferent, as well of spirituous liquors as of any other articles of merchandise or traffic; that it followed necessarily, if a statute which contains no prohibition of retailing, speaks of retailing, an indifferent act, as an "offence," reference must be had to some other existing law prohibiting it, and making what in itself is innocent, criminal. In what law was this prohibition to be found? Not in the act of 1831, for that was expressly repealed by the act of 1838. Not in the acts of 1811 and 1823; because as no laws are repealed by a new statute but those which are mentioned, and as the repeal of a repealing statute revives the laws which it annulled, so here, by repealing the act of 1831 by designation, and saying nothing of the acts of 1811 and 1823, which had been repealed by that act, they stand revived. But they contain no prohibition of retailing *per se*. On the contrary, they prohibit unlicensed retailing, and prescribe the mode of licensing. And in the mode prescribed, Dyer has been licensed, and consequently has been guilty of no "offence," in retailing the liquor as charged in the indictment.

But supposing the acts of 1811 and 1823 not to be revived by the repeal of the statute repealing them; that is, supposing it to be true, as insisted, that the act of 1838 does contain a substantial prohibition of retailing, denominating it an "offence," still, what that "offence" is, can only be known by referring to the acts of 1811 and 1823, and such reference

can be made to those statutes, neither for that, or any other purpose, if, as contended, they are not revived.

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It is extremely metaphysical, if not nonsensical, to argue, that a portion of the act of 1832, a law which is only amendatory of the repealed law of 1831, can remain in force, and escape the fate of the act of which it was an amendment. The argument of the Attorney General supposes that the words—"No public housekeeper, or other person whatsoever, shall retail spirituous liquors in less quantities than one quart," stand unrepealed, a substantive prohibition of retailing; while the concluding words of the section—"unless he shall first obtain a license for that purpose, as provided for in the act of 1831, which this is intended to amend," are utterly abrogated. This mode of decimating a law, destroying the Egyptians and passing over the Chosen People, is at least new, and is a discovery to which nothing but the march of mind and lapse of ages could ever have brought the world. To be serious, it is believed that no precedent can be found where a part of a section has been regarded as repealed, while the residue standing in close, and, one would think, inseparable connection with the other part, has been held to remain untouched. It would be difficult to believe that the legislature intended, by abrogating the licensing power, to produce so wonderful a metamorphosis upon the act of 1832, as to make out of what was a law regulating the *mode* of licensing retailing, a simple and unqualified prohibition of retailing.

TURLEY, J., delivered the opinion of the court.

December 17.

Isham Dyer was indicted and convicted of the offence of retailing spirituous liquors—and as a punishment therefor was sentenced by the judgment of the circuit court of Davidson county to pay a fine of ten dollars; to reverse which, this writ of error is prosecuted, and it is now contended on his behalf that the judgment of the court below ought to be reversed—because, 1st, he obtained a license from the county court of Davidson, on the 6th day of February, 1838, to keep an ordinary for twelve months, under which he was by law authorised to retail spirits—and that it was during the continuance of that period of time, that the offence, if any, was committed, for which he stands convicted. And 2d, that he

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applied to the clerk of the county court of Davidson, for a license to retail spirituous liquors at a period of time, when by law he was entitled to receive it—and that the clerk, who was the agent of the state, authorised to issue it, refused to do so.

The first proposition presents the question, whether there was on the 6th day of February, 1838, any law in force which authorised the clerk of the county court of Davidson to issue a license, under which spirituous liquors might be retailed, and if not, whether there is any law, under the provisions of which a person may be punished for so doing? In order to a correct determination of this question, it becomes necessary to examine the various statutes which have been enacted upon the subject, in order to deduce therefrom the proper rule of action. The offence charged, not being such at common law, it necessarily follows, that if there be no statute prohibiting it, it is not indictable; and also, that though it may be in general prohibited, yet if it be permitted under particular exceptions, and the person charged can bring himself within an exception, it ceases to be an offence.

The act of 1767, c 8, § 16, recognises a law in existence, requiring all persons, wishing to keep an ordinary, (which is a public house of entertainment,) to obtain a license for that purpose—the words of the statute are, “Every person who shall obtain a license agreeably to law, to keep an ordinary, &c.

The act of 1779, c 10, § 3 and 12, provides that “no person, not having license for keeping an ordinary, shall sell or retail spirituous liquors in smaller quantities than the quart, under the penalty of one hundred and twenty-five dollars, nor by larger quantities than the quart, to be drank at the place where sold.

The act of 1811, c 113, § 1, provides, that any person or persons wishing to keep an ordinary or house of entertainment, shall prefer his or her petition to the county court in which he or she resides, paying a license therefor, for one year; and if said court, upon examination of his or her petition, are satisfied that he or she so applying, are of sufficient probity, and not addicted to any gross immorality, they may

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order the prayer of the petitioner to be granted. The second section provides, that if any person or persons shall keep an ordinary, or retail liquors, by a smaller quantity than is pointed out by the act of 1779, c 10, without first having obtained a license therefor, as aforesaid, such person or persons shall be liable to an indictment for keeping a tippling house, and upon conviction, shall be fined by the court in a sum not exceeding five dollars, nor less than one dollar. The act of 1823, c 33, provides in § 1, that no county court in this state shall hereafter grant license to any person whatever to keep a public inn, or house of entertainment, unless the person applying for such license, shall first prove in open court, by the testimony of creditable witnesses, that the person applying has a good moral character, and that he, she or they are provided with lodging, stables and house room for the accommodation of travellers and lodgers; and in no case shall such license be granted, if the court shall be of opinion, that the retailing of spirituous liquors is the principal object in obtaining such license.

The act of 1831, c 80, provides in § 1, that any person wishing to retail spirituous liquors in this state is hereby authorised to apply to the clerk of the county court, of the county in which he may wish to retail such liquors for a license for that purpose, and said clerk is hereby authorised and required to issue to such person so applying, a license for the term of one year, from the date thereof—said applicant first paying therefor to said clerk the sum of twenty-five dollars.

The act of 1832, c 34, which was passed to amend the act of 1831, c 80, provides in section 1st, that no public housekeeper, or other person whatever, shall retail spirituous liquors in less quantities than one quart, unless he shall first obtain a license for that purpose, as provided in the act intended to be amended. The act of 1835, c 13, § 4, provides, that each and every keeper of a tavern or house of public entertainment shall pay annually a tax of five dollars, with a proviso, that such license shall not authorise the retailing of spirituous liquors, unless such privilege is mention-

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ed in the license, in which case, twenty-five dollars shall, in addition to the sum of five dollars, be paid for such license.

The act of 1838, c 120, entitled an act, to repeal all laws licensing tippling houses, and for other purposes—provides in section 1st, that the act of 1831, c 80, and so much of the fourth section of the act of 1835, c 13, as relates to the licensing and increasing the tax on those who retail spirituous liquors, be, and the same are hereby repealed. It also provides in section second, that all persons hereafter convicted of the offence of retailing spirituous liquors shall be fined at the discretion of the court, as in other cases of misdemeanor.

Upon this review of the statutes, the first thing that strikes us, as worthy of remark is, that from the year 1779, up to year 1831, in all laws passed upon the subject of retailing spirituous liquors, there appears to be an anxiety, which increased upon every action by the legislature to confine the privilege to persons of probity and trust, and who from being engaged in a laudable and necessary calling, requiring both industry and capital in order to be conducted with success, it was supposed would have every inducement not to abuse the dangerous privilege entrusted to them. The act of 1779 confined the privilege to persons who had obtained a license to keep an ordinary. This was found not to be sufficient to control within proper limits the evils resulting from retailing spirituous liquors. The act of 1811, confined the privilege to those whom the county court, upon examination, should be satisfied were of sufficient probity, and not addicted to any gross immorality. This was found not to be sufficient for the purpose designed, and the legislature being determined to find a remedy for the evil, passed the act of 1823, by which the privilege was confined to those, who could, by creditable witnesses, show that they were of good moral character; that they were provided with bedding, stables and house room, for the accommodation of lodgers and travellers, to wit, that their design was in good faith to keep a house of public entertainment; and to ensure this, the court was prohibited from granting the privilege, if, in its opinion,

the retailing of spirituous liquors, was the principal object in asking a license.

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The next thing that strikes us as worthy of remark, is, that in 1831, some eight years after the passage of the act of 1823, the whole policy of legislative enactment upon this subject appears to have been changed; instead of the restrictions of occupation and character, which had heretofore been thought of such vital importance in the granting of a privilege so liable to abuse in unworthy hands; it appears, that nothing thenceforth was to be taken into consideration, but the ability to pay a tax of twenty-five dollars. Whence, it may be asked, did this great and sudden change take place? The reason is to be found in the history of the country. It had been ascertained by experience, that restrictions which had been previously created, and which it had been believed were of such a character as would control, and keep within proper limits this dangerous privilege, had been totally disregarded by those to whom the power of granting it had been entrusted; and it was hastily thought, that no greater evil would result from increasing the tax, and making the privilege common to all persons.

The next thing that strikes us as worthy of remark, is, that it was found necessary, in the year 1832, the first year after the passage of the act of 1831, to begin to put restrictions on its operations, by compelling all persons, before obtaining a license to retail spirits, to take an oath, that they would not retail any spirituous liquors to any slave, nor permit the same to be done, unless by the written permission of the master or overseer. In the year 1835, it was found necessary to continue the restrictions by an additional oath, that they would not knowingly permit nor allow any gaming for whiskey, wine, money, or any other thing to drink or eat, or other valuable thing, in the house in which the spirits were retailed, or on the premises. And that if any such betting or gaming should take place within their knowledge, that they would give information thereof to the grand jury of the next circuit court, and also to inflict the pains and penalties of perjury upon all those who might violate this oath; and finally, it was found necessary to pass the act of 1838, which is en-

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titled as has been seen, an act to repeal all laws licensing tippling houses.

Now what is the legitimate conclusion from this view of the subject? That inasmuch as the legislature had tried to obviate the evils resulting from the license to retail spirituous liquors by the restrictions of character and occupation, until it was found to be of no avail; that having then extended the right, without restriction to every person, until it was found at the expiration of one short year, that they were again compelled to resort to them; and that finding at last that oaths and obligations could not remove the dangers and difficulties arising from the passage of the act of 1831, it was deemed expedient to put a stop to the practice of retailing spirituous liquors altogether. That this is the correct view of the subject, the history of the country also proves. It is not contended that this view of the case is conclusive, though we think it entitled to much weight, and the more especially, if there be doubt in the construction of the statutes referred to upon this subject.

We will now proceed to examine the grounds upon which the defence in this case is made to rest. 1st. It is said, that the act of 1838, c 120, only repeals the act of 1831, c 80, which authorised every person, upon the payment of twenty-five dollars, to procure a license to retail spirituous liquors, and so much of the fourth section of the act of 1835, c 13, as required the keeper of an ordinary in addition to his tax of five dollars for such license, also to pay twenty-five dollars additional tax for the privilege of retailing spirituous liquors. And that the necessary consequence is, that inasmuch as these statutes operated as a repeal of the acts of 1811, c 13, and 1823, c 33, their repeal again sets up the acts of 1811 and 1823. To this objection it is answered, first, that though it may be true, that the act of 1838 only repeals the act of 1831 and part of the act of 1835, yet, neither the act of 1811 nor 1823 can be set up thereby; because the acts of 1811 and 1823 are also repealed by the act of 1832, c 34, which is not repealed by the act of 1838, and this upon the principle of the construction of statutes, that when two statutes repeal another, a repeal of one of the re-

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pealing statutes will not again set up the statute repealed. We recognise the correctness of the legal principle, and the only question then is, whether the act of 1832, is a repeal of the acts of 1811 and 1823. We think it is. We have seen, that by the provisions of the acts of 1811 and 1823, persons who obtained a license to keep an ordinary, might retail spirituous liquors. By the provisions of the act of 1831, any persons wishing to retail spirituous liquors were authorised to apply for a license for *that* purpose, (not for the purpose of keeping an ordinary,) and were entitled thereto upon the payment of twenty-five dollars. By the act of 1832, the keeper of a public house is prohibited from selling spirituous liquors by retail, unless he shall first obtain a license for that purpose, under the provisions of the act of 1831. Now this of necessity is a repeal of that portion of the statutes of 1811 and 1823, which authorises the keeper of an ordinary or public house to retail spirits. By these statutes all that was necessary was to procure a license to keep an ordinary, and the right to retail spirits followed as a consequence; but by the act of 1832, although the ordinary license be procured, yet the consequence is excluded, unless a special license therefor be obtained, under the act of 1831; this act being repealed, no such license can now be procured, and the consequence cannot attach to the keeping of an ordinary under the repealed statutes of 1811 and 1823.

2. This objection is also met by the answer, that the act of 1838, c 120, does operate virtually as a repeal of all laws authorising a license to retail spirituous liquors, because, by the provisions of the second section it is made a misdemeanor to retail spirits, punishable by fine, at the discretion of the court, as in case of other misdemeanor. We have seen that the wording of this section is, that "all persons convicted of the offence of retailing spirituous liquors shall be fined," &c. This, it is contended, creates no new offence, but only refers to one created before, viz., the retailing of spirituous liquors without a license; that if the acts of 1811 and 1823, the laws authorising a license to be issued have been repealed, then we have nothing by which the offence can be

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defined, as the repealed statutes cannot be referred to for that purpose.

We do not recognise the correctness of this principle, but hold, that when it may become necessary to refer to a repealed statute, in order to define correctly an existing offence, it may well be done, but if this were not so, it could avail the defence nothing, for the statutes of 1811 and 1823 do not either of them define what retailing spirituous liquors is. It is true, that the act of 1811 makes it indictable to do so, without a license, under the restrictions there created, and the act of 1823 does the same. But when we wish to ascertain what retailing is, we are under the necessity of referring to the act of 1779, c 10, where it is defined to be, *the selling of any quantity less than a quart without license, or any greater quantity, if to be drank at the place where sold;* and subjects persons guilty of so doing to a penalty of one hundred and twenty-five dollars. This statute is not repealed by the act of 1838, c 120, at least so far as it inflicts the penalty upon all persons who may sell by a greater quantity than the quart, intended to be drank at the place where sold, which penalty this court, in the case of *Moore vs. The State*, 9 Yer. 353, held to be inflicted by the 12th section of said statute. The offence of retailing spirituous liquors, then, was created by the act of 1779, c 10, and subjected persons guilty thereof to a penalty; it was made indictable by the acts of 1811 and 1823, provided a license for that purpose was not obtained, and it is made indictable by the act of 1838, without any exception in favor of a license. But, as has been said, if there were doubt as to the construction which should be given to this statute upon its wordings, we could have recourse to information derived from the history of the country as to the evil intended to be remedied, for the purpose of aiding us in giving the correct construction: we could also call to our aid for the same purpose the title to the act. When all these principles are combined, they form a case of entire prohibition to retail spirituous liquor, so strong, that it is impossible to assail it with any hope of success.

2. It is said in defence, that Dyer, on the morning of the

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27th of January, 1838, applied to the clerk of the county court of Davidson, for a license to retail spirituous liquors, which was refused, although there was then no law in existence prohibiting it. The act of 1838, c 120, had passed both Houses of the Legislature on the 26th of January, 1838, but was not signed by the speakers till the evening of the 27th. And it is contended, that the act had no validity till this was done, and therefore could not have taken effect at a period anterior thereto.

It is true, that it is provided by the eighteenth section of the 11th article of the Constitution of the State of Tennessee, that "no bill shall become a law until it shall be read and passed on three different days in each house, and be signed by the respective speakers." But when this has been done, we think the law takes effect from the date of its passage by relation. The duties to be performed by the speakers in signing the statutes is not of a legislative, but ministerial character. And to cause the operation of a law to depend upon the period of time when this duty was performed, would introduce too great uncertainty in the administration of justice, as there would be nothing but the memory of man to resort to for the purpose of ascertaining it.—The signature not being dated, and there being no record of the time kept.

But we also think that the refusal of a clerk to issue a license to retail spirituous liquors under the provisions of the act of 1831, even if it had been in force, would not have authorised the plaintiff in error to retail as if he had procured one. It is the possession of the license, not the application, which gives the right; and the only remedy, in the case of a refusal, would be against the clerk, either by an action on the case, or by mandamus.

We are therefore of opinion, that there is no error in the proceedings of the court below, and affirm the judgment.

NOTE. Statutes take effect upon the most remote and secluded portions of the State, from the time of their passage, not allowing a *single moment* for gaining intelligence of their passage:—a principle of law destitute of every semblance of reason, and fraught with hardship and severity. It is not quite so bad, however, as the old English rule—by which, if no period was fixed by the statute itself, it took effect, by relation, from the first day of the session in which the act was passed. This rule was abolished by an act of 33 Geo. III—1793—

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by which statutes are to have effect only from the time they receive the royal assent. The settled principle of American law is declared by Marshall, C. J., in *Matthews vs. Jane*, 5 Cond. R. 270, to be, "that a statute, for the commencement of which, no time is fixed, commences from its date;" the constitutional prohibition of *ex post facto* and retrospective laws having annulled the ancient rule of the common law. The statutes of the United States take effect from the day of their approval by the President, that being the day of their date. The same rule, of course, applies to the statutes of those States in which the executive is so far a branch of the legislative department, as that his concurrence in its acts are necessary to their perfection. But in those states where bills, which have passed the houses, become laws when signed by the speakers, and not until then, it would seem to be giving them a retroactive effect, to make them relate to the day of their passing the houses.

In New York, every law, unless a different time be prescribed therein, takes effect throughout the state, on, and not before the 20th day after its final passage. 1 Kent's Com. 454, 3d Ed. This, or some similar rule ought to be adopted in every state in the Union. See 1 Gallison, 62, case of the Brig Ann; 1 Kent's Com. 454, 3d Ed.; Dwarria on Statutes. 687, et seq.

NASHVILLE BANK vs. GRUNDY & HAYS.

CHANCERY. *Trust by implication or operation of law.* The fiduciary character cannot be superinduced upon property by implication or operation of law, unless the intent of the parties to invest it with that quality be deducible from the nature of the transaction.

SAME. *Same—stipulation to take the shoes of an endorser, force of it.* Hence if two persons be liable as accommodation endorsers for a bank debtor, on several notes, and one of them stipulate "to take the shoes of the other as regards the endorsements," for a specific consideration which is paid him, and the bank be defeated of its remedy against the indorsers on one of the notes, whereby there arises a surplus of the fund placed in the hands of the indemnifier; the bank has no equitable right, title, or interest in the surplus; and it does not stand charged with a trust in the indemnifier's hands: because the force of a covenant to take the shoes of another, for a certain sum, is not to pay the sum in discharge of the liability, but to be liable instead of the party whose place is assumed, should he be made liable. The rule is the same if a stranger, and not a co-endorser assume the responsibility.

SAME. *Jurisdiction.* If an accommodation endorser take an indemnity from his principal, the creditor cannot reach the property which constitutes the indemnity, till there shall be had a judgment at law against the endorser, and an execution returned *nulla bona*.

Edward Lanier having had a running accommodation in the Nashville Bank and Farmers' and Mechanics Bank of Nashville, and given his bills single, or notes endorsed by Felix Grundy and Oliver B. Hays, or one of them, to secure said loans; and having also given other notes or bills single, endorsed by them or one of them, payable in some one of the

Banks of Nashville; and wishing to continue their endorse-^{Nashville Bank}ments, in order to secure them for past as well as future en-^{vs.}dorsements, on the 3d of September, 1819, executed to them a deed for 276 acres of land in Davidson, ninety shares of Nashville Bank stock, and one hundred shares of Farmers' and Mechanics' Bank stock, in trust, that if he permitted any note or bill single on which Grundy and Hays, or either of them was endorser, to lie over, and be unpaid by him in whole or part, and Grundy and Hays, or either of them should be compelled to take up any of the notes or bills endorsed for him by them; or they should be put to any trouble or costs, or be made to pay any damages by reason of their endorsements, they were authorised to sell the land and transfer the stock, or so much of them as might be necessary for their indemnity.

On the 18th of April, 1832, with a view of adjusting some misunderstandings between them, relative to this trust deed, Grundy and Hays entered into an agreement in writing, under seal, in which Hays agrees "to take the shoes of Grundy as regards his endorsement of certain notes payable to the Nashville Bank, one for about 4800 dollars, on which Andrew Hays and said O. B. Hays were also endorsers; of one for about 625 dollars, on which Grundy and Thomas Hamilton were endorsers; also of a note of E. Lanier of 1000 dollars, on which Grundy and Edward Ward were endorsers, and on which Grundy had been sued by Ward, and of a note of Lanier to John Boyd for ninety dollars, on which Grundy was endorser." In consideration of which, Grundy undertakes to pay certain judgments for which he and Hays were liable, to relinquish to Hays all his interest in the deed of trust, and on request of Hays, at his office in Nashville, to endorse to him good negotiable notes on men in Sumner county, then on interest, to the amount of \$4000. But it was understood and agreed that Hays was to have the privilege of making all and every defence, to any or all of said notes, or the endorsements thereof, which Grundy might or could make: and Hays was authorised to use Grundy's name therein, or in any appeal, or suit in equity which he might think proper to make or prosecute; and Grundy was

Nashville Bank not, by any thing to be said or done by him, in the least to hinder or impair the same. And Hays agreed to indemnify and save Grundy harmless from the payment of the notes, and interest thereon, and costs of suit, as to which Hays was to take his shoes,—but this indemnity was not in the least, to hinder or impair Hay's right and privilege to make and put up any defence thereto, which Grundy could or might make; and Hays was, in no respect, to be made responsible for endorsements in which they or either of them had been sued, except in the cases specified in the instrument; and he was to have the benefit of any recourse against Lanier, to which Grundy was or might be entitled, except as to 2000 dollars, which Grundy had agreed with Lanier not to claim of him. But the instrument was not to be so construed as to impair any claim which Grundy might have against the estate of Anthony Foster for contribution on one of the notes which Grundy engaged to pay; nor to impair the claim of O. B. Hays against Andrew Hays for contribution on the note endorsed by him. On the 22d of April, Grundy and Hays added at the bottom of this paper, a covenant on part of Grundy, that, as regarded 800 dollars of the principal of the note of Lanier endorsed by Andrew Hays, and on which he had been sued by the Nashville Bank, and interest on that sum from the time the note became due, Andrew Hays was bound and liable therefor; and O. B. Hays took upon himself the risk of A. Hays' solvency. And on the same 22d of April, O. B. Hays executed a receipt upon this paper of 4000 dollars in endorsed notes paid by Grundy. On the 26th of January, 1827, Lanier and Grundy joined in a deed of relinquishment to O. B. Hays, of the 276 acres of land mentioned in the deed of trust.

The Nashville Bank recovered separate judgments against Lanier and Hamilton upon the note for six hundred and twenty-five dollars, namely, against Lanier on the 5th of November, 1821, and against Hamilton on the 29th of November, 1831. The Bank issued executions upon these judgments, but not succeeding in making the money, they filed their bill on the 23d of January, 1834, in the chancery court at Franklin, against Grundy and Hays, which was twice

afterwards amended. They charge the insolvency of Lanier ^{Nashville Bank} and Hamilton and the consequent impossibility of making the ^{v.} ~~the~~ Grundy & Hays money out of them; that Hays had sold the 276 acres of land mentioned in the deed of trust for upwards of 4000 dollars, and received from Grundy 4000 dollars upon the agreement between them, which, with the bank stock assigned to them by Lanier, and relinquished together with the land by Grundy to Hays, was more than sufficient to indemnify Hays for his responsibilities for Lanier, and that there was a surplus of Lanier's property in his hands, which ought to be subjected to the payment of their demand against him; and insisting moreover that the effect of the agreement between Grundy and Hays was to impose upon Hays a trust to pay the debt in question, and praying that he should be decreed to pay it accordingly.

The defendant Grundy demurred to the original bill, and Hays answered and demurred. To the first amendment they both demurred. The demurrers were overruled, and they answered the original and first amended bill at great length, as they did also the second amended bill, giving of the transactions out of which the papers above recited grew, as also of those which followed their execution a minute detail. But it is unnecessary to repeat it, as the questions debated and decided in this court were—whether the agreement of the 18th of April, 1825, between Grundy and Hays did create a trust on part of Hays to pay the note to the Bank on which Grundy and Hamilton were indorsers? And whether the Bank could have relief in equity against Grundy, who was responsible to them, as endorser of that note and not otherwise?

The cause was heard in the chancery court, before his Honor Chancellor BRAMLITT, at October term, 1837, who being of opinion that no trust existed on part of Hays to pay the surplus of the sum which he had received from Grundy, towards the debt in question, dismissed the amended bills in which the complainant attempted to set up that trust. But being also of opinion that Grundy and Hays were accountable to the Bank for any surplus that might be in their hands, of the proceeds of the lands conveyed to them by Lanier, wheth-

Nashville Bank ^{v.} er rents or price, the chancellor ordered an account there-
Grundy & Hays of. From this decree the complainant appealed.

Decem. 15, 17. JAMES CAMPBELL and WASHINGTON for the Bank.
Cook for Hays,—MEIGS for Grundy.

GREEN, J. delivered the opinion of the court.

December 18. The first question to be determined in this case is, the true character of the covenant between Grundy and Hays, of the 18th of April, 1825.

It is insisted by the complainant, that the amount which Grundy by the said agreement placed in the hands of Hay's was a fund created by Grundy, for the payment of the debts therein mentioned, and that it was held by Hays in trust for that purpose. On the other side it is contended, that the amount given by Grundy, was advanced in consideration of the covenant of Hays, to stand in his shoes, and indemnify and hold him harmless from the payment of the debts mentioned in the covenant, and that Hays was to do this irrespective of the amount of the consideration advanced by Grundy.

We are of opinion, that this covenant does not create a trust fund in which the Bank has any interest. Indeed, it appears to us, that the parties have carefully avoided the use of any language that would justify such a conclusion. Hays undertakes to defend any suits that may be brought against Grundy, at his own expense, and without compensation for his trouble. It is not likely that he would have done so, had there not been a prospect of some corresponding benefit to himself. He stipulates for the privilege of making every defence, which Grundy would have a right to make, and that Grundy is not, by any thing he may say or do, to impair or hinder the same. If the fund were put in his hands, in trust to pay Grundy's debts, why should he feel solicitous about the privilege of making every possible defence, and insert a covenant that Grundy should not hinder or impair his right to do so? He could have no interest to defend suits against Grundy successfully, if it was impossible for him to be a gainer by Grundy's success. It must be observed too, that Hays was not previously liable for these debts. He was not

Grundy's surety, receiving an indemnity against his liability, ^{Nashville Bank} previously existing to the Bank. He is now for the first time ^{v.} Grundy & Hays connecting himself with the claims; and the undertaking is to resist them, by all legal means, and in case of failure to indemnify Grundy.

But the stipulation, that Hays "should stand in Grundy's shoes," a phrase very expressive of the meaning of the parties, not only gives him a right to make every legal defence that Grundy could make; but it exempts him from liability, except in cases where Grundy would have been liable, had the agreement not been made. How can he stand in Grundy's shoes if he is made liable for a debt, for which Grundy is not legally liable?

It cannot be doubted, but that if the consideration of this covenant had been but one dollar, Hays would have been liable in damages, to the full amount of all the demands against which he undertook to indemnify Grundy. The nature of the covenant and the responsibilities of the parties are not changed, by the amount of the consideration. Hays is bound to indemnify Grundy, or be responsible in damages for failing to do so. With the agreement the Bank has nothing to do; and as it cannot come into this court, on the ground of a trust fund having been placed in the hands of Hays for the payment of its debts, so there is no other ground upon which equity can take jurisdiction.

But if it could litigate its right to have judgment against Grundy in this court, it is clear that its action is barred by the statute of limitations. The statute commenced running, at furthest in 1823, and this suit was brought in 1834, more than six years thereafter.

This, however, is clearly inadmissible. The claim of the Bank against Mr. Grundy is purely legal, and must be litigated in a court of law. The jurisdiction of this court cannot attach, until there shall be had a judgment at law, and an execution against Grundy returned *nulla bona*.

The decree must be affirmed.

HOWERTON *vs.* THE STATE.

JURY. Challenge propter affectum. Loose impressions and conversations of a juror, as to the prisoner's guilt or innocence, founded upon rumor, would not, if disclosed by him or others to the court on the selection of the jury, have the effect to set him aside as incompetent; nor, if disclosed after verdict, be a cause of new trial.

Howerton was indicted by the Grand Jury of Cannon county, on the 23d of March, 1838, for horse stealing. He pleaded not guilty, and was immediately put upon trial, but the jury were unable to agree, and a mistrial was entered.— At May Term, 1838, he was tried and found guilty. He moved for a new trial upon the ground that two of the jurors, previously to their being called to be of the jury, had expressed their opinion that he was guilty,—although when tried as jurors, they declared, upon oath, that they had formed no opinion. To this purpose he made his own affidavit, and produced the affidavits of three other persons, one of whom swore that Bryant, one of the jurors, before he was called to be of the jury, had expressed his opinion that the defendant was guilty of the charge preferred against him, and ought to be convicted and sent to the penitentiary. The second affidavit stated that the affiant had heard St. John, one of the jurors, speaking of the defendant previous to the March Term of the Court, declare “that he ought to have been sent to the penitentiary before.” The third affidavit stated that the same St. John, after the mistrial at March Term, “expressed his opinion upon the merits of the case.”

His Honor, Judge MARCHBANKS refused a new trial, and the defendant appealed in error.

December 19. COOK and E. H. EWING, by appointment of the court, appeared for the plaintiff in error.

The Attorney General, on behalf of the State, said that the two last affidavits were not to the purpose,—the second merely stating that the juror had expressed his opinion of the general bad character of the defendant, not as to his guilt in the particular case;—the third, that the juror had expressed an opinion upon the merits of the case indeed, but not that the defendant was guilty. The first affidavit is to the point, that

the juror had actually declared his opinion that the defendant was guilty in the premises, before he was called to be of the jury. But this was a mere loose declaration, which is fully done away by his swearing that he was without an opinion. The juror *swears* that he was impartial. The affidavit states that the affiant heard the juror *admit* his partiality in conversation.

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REESE, J. delivered the opinion of the court.

The jurors who returned the verdict in this case were tried before the presiding judge, according to our practice, to ascertain whether they were good and lawful men, and above all just exception. Upon this trial and examination, all who were elected by the prisoner, and among the rest, one Littleberry Bryant and one Thomas St. John, testified, on oath, that they had neither formed nor expressed an opinion as to the guilt or innocence of the prisoner. After a verdict of conviction, the defendant, on a motion for a new trial, presented to the court his affidavit, stating that, at the time, Bryant and St. John were put to him for challenge or election, he did not know that they had formed and expressed an opinion; and his affidavit was accompanied by the affidavit of three persons, to prove that the jurors in question had formed and expressed the opinion that he was guilty.

December 20.

Two of these affidavits relate to the juror St. John, one of them stating that the juror had said, in reference to some previous conduct of the defendant, that he ought to have been sent to the penitentiary; and the other, that he had expressed his opinion upon the merits of the case before the court, without disclosing in the affidavit whether that opinion was favorable, or the contrary. It is obvious that these affidavits deserve not the least consideration.

The other affidavit relates to the juror, Bryant, and states that the juror, shortly before the trial, declared to affiant that his opinion was that the prisoner was guilty "of the charge, and ought to be convicted and sent to the Penitentiary." And the question is—Ought a new trial to have been granted on the ground of this affidavit? We are clearly of opinion that it ought not.

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Without insisting, as might well be done, that the oath of the juror, upon the trial *quoad affectum*, before the court, would be an equipoise as against the oath contained in the affidavit, we think that if there had been other affidavits of the same tenor, they ought not to countervail the oath of the juror. The loose impressions and conversations of a juror, founded upon rumor, would not, if disclosed by him, or others, to the court, have the effect to set him aside as incompetent, and might, therefore, be readily forgotten, or even, perhaps, properly pretermitted by the juror, when upon oath, as not deserving to be regarded as the formation or expression of opinions and convictions. Nothing would be more calculated to impair the just administration of the laws than to set aside verdicts upon such grounds.

When a case shall arise of a juror, hostile to a defendant, and maliciously seeking, with a view to his injury, to pass upon his trial, by denying upon oath his opinions and convictions, it will present a case, which, as it will differ from the present, may receive from us a different determination.

Let the judgment be affirmed.

NOTE. The authorities upon this subject will be found collected in 1 Chitty's Criminal Law, 542, Note A, 3d Am., from the 2d Eng. Ed., and 1 Cowan, 438 in note.

ANTHONY vs. THE STATE.

HOMICIDE.—*Murder in the first degree.* To constitute this offence the killing must be wilful, and malicious, and deliberate, and premeditated.

SAME. *Sense.* A killing not superinduced by passion or provocation, deliberate and premeditated, is murder in the first degree, though deliberated and premeditated but a moment.

SAME. *Murder in the second degree. Manslaughter.* A killing under the influence of passion, or upon provocation, before the passion had time to subside, would only be murder in the second degree;—or manslaughter, if the provocation was a sufficient and legal one.

The definition in *Dale vs the State*, 10 Yerger, *52, recognized.

EVIDENCE. *Bill of Rights. Dying Declarations.* The provision of the Bill of Rights declaring the right of the accused, in criminal cases,—“to meet the witnesses face to face, and have compulsory process for obtaining witnesses in his favor,” is not violated by the admission of dying declarations.

SAME. *Sense.* The principle asserted in the Bill of Rights, and that as to the admissibility of dying declarations, are coeval rules of the common law. The first was inserted in the Bill of Rights, because it had been maintained, with difficulty, against the Crown, by the popular party. The other had never been debated between them, and hence was omitted.

SAME. *Sense. Rule.* If a dying person either declare that he knows his danger, or it is reasonably to be inferred, from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence.

The Rule stated, 1 East. P. C., 354, recognized.

On the 18th of December, 1837, the Grand Jury of Bedford county, indicted the defendant for murder, committed on the body of Mary, his wife, by feloniously, wilfully, and of his malice aforethought, shooting her with a pistol, charged with powder and a leaden bullet, on the 16th of December, 1837, thereby giving her a mortal wound, whereof she languished until the 17th of December, and then died.

A *capias* having been issued, and the defendant arrested and committed to jail, he was brought to the bar the same day on which he was indicted, and being arraigned, pleaded not guilty, and issue was thereupon joined, and, by consent, the cause was continued till April Term, 1838, when he was put upon his trial.

Caroline Anthony, the defendant's daughter, aged eleven years, swore that she and a negro woman had left the house a few minutes before the pistol fired to bury some cabbage; that when she returned her father was standing in the door, and the baby was near him on the floor; that her father directed her to take out the child, which she did, and took it to the kitchen;

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that in about half a minute, after she got to the kitchen, she heard a pistol fire, and her mother exclaim. She immediately ran back, and her father was standing at the door with his pistol in his hand, and said to her—"I have killed your mother, don't cry;" that she went into the house, and her father came in and said—"Polly have I hurt you, where did I hit you?" and then went away, and came back after a while with Mrs. Hiles and others. When the witness first went into the house, her mother was lying on the floor near the fire, and she got up, after her father went away, and crawled into the bed by herself. When the witness left the house to bury the cabbage, her mother was engaged in putting bats in a quilt. Her father and mother were then in a good humor, and had been so all that day. When she took the child from the door, her father had no pistols in his hands that she then saw. The pistols were usually kept in a chest in the same room of the house.

Mrs. Hiles, who, with her husband, lived about 250 yards from defendant's, had dined at his house on the day of the killing, and had remained there till about an hour before it.—The defendant and deceased were as friendly and affectionate as could be. The defendant, immediately after the killing, came to her house with two pistols in his hands, and threw them at her feet. She and several others accompanied him back to his house. He was the first to suggest sending for a physician, and urged the messenger to go with speed; and though advised to make his escape, he remained at home during the whole night, and was under no restraint.

Dr. Barksdale, the physician, stated that about ten or eleven o'clock on the night of the day on which the deceased was shot, he enquired of her, "Whether she was shot accidentally or by design?" The defendant's counsel objected to his detailing the dying declarations, the witness stating that previous to his enquiry, he had made no communication to her, nor heard any made by any other person, informing her of her approaching dissolution; nor heard her say any thing concerning her consciousness of her approaching dissolution, only that *she was suffering great pain, burning heat and great sickness of the stomach*; that the wound was a large pistol

shot, and that such a wound, ninety-nine times in a hundred, produces death. He thought she was fast sinking at the time of his inquiry, but she did not die until the next day about 10 or 11 o'clock.

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The defendant's counsel, upon this statement, objected to the witness's speaking of the dying declarations; but the court overruled the objection, to which opinion the counsel excepted. The witness then stated, that in reply to his question, the deceased said—"It was done with design, and what she had long expected, but the defendant was not right."

Dr. Barksdale further stated that he had known the defendant for many years, and saw no evidences whatever of derangement or insanity on that night, or at any other time. He got to the defendant's house in this county about dark, or a little after, a few hours after the shooting. The defendant paid no attention to his wife that night, but lay down by the fire. He stated that his attention was directed to the defendant during the night to see what was the condition of his mind, and was satisfied he was not insane.

Thomas J. Loyd was at the defendant's all the night after the killing—did not see the defendant wait on his wife until Dr. Barksdale had gone to bed, which was late at night. He lay with defendant at the fire.

Samuel Sloan saw the defendant going along the road in April 1837, when some young mules having got around his colt, and hemmed it up, the defendant said—"It is a plot made up, and I must have blood, and now is as good a time as any."

Something more than twelve months before the trial, the defendant sent for witness, and when he went he found the defendant sitting some distance from the house on a log. He talked strangely, saying that he had made peace with God and God with his soul; that *he could not sleep at nights and wanted laudanum*; that witness got him some; that, on one occasion the deceased showed witness a vial of laudanum, and said she was afraid the defendant would do himself some injury; he had taken a small portion of one of the vials of the laudanum, which witness got him.

Dr. A. M. Holt had known defendant for several years;—

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saw him once two or three years ago, when he was laboring under a slight attack of *mania a potu*; had all the symptoms of that disease as contained in the books; has seen him twice since, when he considered him partially insane from the same cause. The last time was during the summer of 1837.

Benjamin Rives lived in a mile of defendant; was well acquainted with him, and never saw him at any time when he thought him deranged. At times, when he was drinking, his habits were like other drinking men's. He drank by *sprees*, was always a shrewd, active, money-making man. (See Ray's Med. Juris. § 319)

There was other testimony concurring in stating him to be sane and shrewd, and some stating vaguely that he sometimes behaved strangely.

There was also testimony showing that he and his wife had, in the spring of 1837, separated, and she had gone to her father's, where she had staid till defendant persuaded her to return, and that they had had frequent jars.

DILLAHUNTY Judge, holding the court instead of ANDERSON, Judge, charged the jury. The part of his charge excepted to by the defendant's counsel was—

"That to constitute murder in the first degree, it would not be sufficient that the killing was wilful and malicious (5 Yerg. 340.) It must also have been deliberate and premeditated; that, in the absence of passion or provocation, the length of time during which the prisoner deliberated and premeditated was immaterial; that if there was neither passion nor provocation, and the design to kill was formed, it would then make no difference whether that design had been deliberated on but one moment, one day or one week: (2) but if the design to kill was formed, under the influence of passion, or upon provocation, and the killing ensued before the passion had time to subside, it would only be murder in the *second degree*; or manslaughter, if the provocation was a sufficient and legal one, as above explained to the jury."

The jury returned a verdict in the following words:—"We find him, the defendant, Alfred Anthony, guilty of murder in the first degree, in manner and form as charged in the indictment."

ment; but we are of opinion there are mitigating circumstances in his case."

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The defendant was called upon by the court to know if he had any thing to say why judgment should not be pronounced against him, when his counsel moved that the cause be adjourned till the next day, which was done. On the next day, April 10, 1838, his counsel moved for a new trial, which was denied, and the defendant being again asked whether he had any thing further to say why judgment of the law should not be pronounced against him, said he had not, whereupon the court adjudged—"That the defendant should be confined in the jail and penitentiary house *for and during his natural life*; that he should pay the costs in this case; and that the sheriff of Bedford county be charged with the execution of this sentence forthwith."

LONG, with whom was JAMES CAMPBELL, for the plaintiff in error, said—A reversal of the judgment in this case is asked for on three distinct grounds:

And thereupon the defendant's counsel moved the court for an appeal in the nature of a writ of error to the Supreme Court, which was granted; and a bill of exceptions, containing the above facts, among others, was presented, and signed December 17. and sealed, and made a part of the record.

1. The charge of the Circuit Judge, "That in the absence of passion or provocation, the length of time which the prisoner deliberated and premeditated, was immaterial," and that if the "design (to kill) was deliberated on but *one moment*," it was the same as if deliberated on "*one day or one week*," is erroneous, and particularly calculated to mislead a jury.—The act of 1829 requires that *deliberation* shall be proved before a killing, however wilful and malicious shall be deemed murder in the *first degree*, and punished capital'y. This, the charge does not, in terms, deny, but erroneously undertakes to instruct the jury what time is necessary for deliberation to transpire in the mind. The word "deliberation," as used in our statute, means just what it does in all other well written productions, and as defined in the dictionary—"the act of balancing in the mind, weighing, considering, hesitating," &c. It is not a technical word or word of art, and always conveys

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an idea the very reverse of sudden or instantaneous. Deliberation is a mental process which requires more or less time in its performance, according to the complication of the subject deliberated on, and the activity of the mind engaged in deliberating. In fact, a design may be formed instantly, (or in a "moment") and it may be formed deliberately; but the latter can only constitute the first degree of murder. This is too obvious to require argument; for if it were otherwise, the absurdity would follow, that an instant and a deliberate design to kill are one and the same thing—and if so, why insist on the word deliberate in the statute?

This statute must be construed, *stricti juris*, in favor of life and liberty. This court have construed "deliberately" to mean "with cool purpose," as opposed to a purpose formed in the heat of blood and warmth of feeling. Dale's Case, 10 Yer. 551. But in that case, the length of time necessary for deliberation to transpire in the mind, was not discussed or considered. There, the intent to kill was expressed by Dale (when cool and unexcited) an indefinite time, from 5 to 20 minutes before the killing, as evidenced by the conversation which passed between him and the deceased. The court, therefore, only say what deliberation is, under the circumstances of that case, but do not so much as hint in what time it can occur. The court were only called upon to decide whether the defendant was actuated by passion, and there being no direct evidence of its existence, they were naturally led to inquire whether there was any provocation, from which passion might be inferred. Neither passion or provocation appearing, and from three to twelve hundred "moments" having intervened between the absolute expression of an intention or design to kill, and the shooting, the court refused to say the jury were clearly wrong in finding the defendant guilty of deliberating. Suppose, for the sake of illustration, that the judge had told the jury, in Dale's case, that deliberation could not transpire in less time than one hour, will any one doubt that such a charge would have been false in point of fact, and erroneous, because a matter of fact which should have been left to the jury altogether? This reasoning is exactly applicable to the present case. The judge told the jury, in

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substance, as a matter of fact, that deliberation may transpire in the mind in one moment. We contend, in the first place, that he was evidently mistaken in the fact; and, in the second place, that he erred in attempting to charge upon a matter of fact. The Constitution (Art. 6, sec. 9,) declares that judges shall not charge juries upon matters of fact, but may state the evidence and declare the law. What law provides that the human mind can deliberate upon any subject, no matter how intricate, or how sluggish the particular intellect engaged in deliberating, in "one moment, as well as one day or one week?" In order to escape this view of the subject, it may be contended that the charge of the court does not affirmatively state that one moment is long enough to deliberate upon any subject. This may, strictly speaking, be true—the words are, "if the design (to kill) was deliberated on but one moment," in the absence of passion or provocation; and, further, that "the length of time in which the prisoner deliberated and premeditated was immaterial," &c. What could plain men understand from this language, but that if a design was formed without any reflection or deliberation whatever, and then the defendant kept that design "one moment" in his mind before he executed it, he would be guilty of murder in the first degree, because he had "deliberated for one moment," that being all that is necessary.

It will be noticed that the charge of the court maintains that one moment's deliberation must happen after the design is formed, in order to make murder in the first degree, but denies, provided there be neither passion nor provocation, that there need be even so much as one moment's deliberation in the formation of that design. This is clear; from which it may be inferred, either that the judge considered it "immaterial" how suddenly the design to kill be formed, so that it be not formed in passion, or else that passion alone can prevent a design from being formed with deliberation. Provocation, of course, is only mentioned, because it is likely to excite passion. Did the judge, then, mean to state to the jury, as a matter of fact, that all designs, no matter how hasty and ill-advised, were necessarily formed deliberately, if not formed from the mere impulse of passion? If so, then it is objected,

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as in the other view of the case, that he mis-stated the fact upon which he improperly attempted to charge the Jury.

The charge of the judge would have been unexceptionable had it stated to the jury, that if they believed the defendant had only one moment to deliberate in, and that he did, in fact, during that moment, actually "balance, weigh, and consider," or deliberate the subject before he killed, then he would be guilty of murder in the first degree. But this he did not do. On the contrary, he told them it made "no difference whether the design was deliberated upon one moment, one day or one week"—that is, if defendant had consumed so much time as one moment in deliberating, but had not "weighed, balanced and considered" the design; or, in other words, had not completed the process of deliberating, still he was guilty of "deliberation," and therefore of murder in the first degree. Upon the whole, therefore, the jury were either misled by understanding the judge to charge them that the process of deliberation could always occur in one moment; that is, that all minds, under all circumstances, can "weigh, consider and balance" all subjects in one moment,—or else, that if deliberation be commenced, but in "one moment," and before the mind has "weighed, balanced and considered" the design, killing takes place; that it is murder in the first degree.

Whether the verdict of the jury were influenced by this remarkable error in the charge of the circuit judge, it is not necessary to enquire, because impossible to ascertain with any certainty. This court, it is apprehended, will not refuse to correct an error of such magnitude as this is supposed to be, when appealed to for the purpose, because its application to the particular case in which it is advanced, may not be very manifest. The great duty of this court is to correct errors and establish principles for the government of the country in all future time.

Unless the foregoing view be mainly correct, it is respectfully submitted whether the distinction in murder contemplated by our statute, is not rendered unmeaning and insensible.—The enlightened and humane distinction in that act, expressed in plain and inartificial language, rejects, as absurd and

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cruel, the idea of trying all men, however different their temperament, habits, and education, by the same unbending standard. The common law made no allowance for passion unless excited by a certain amount of provocation—or, if you please, considered a certain measure of provocation necessary to excite passion in all minds. This is called a “sufficient legal provocation,” which was the same in all cases—the dull phlegmatic temperament being placed on a level with the sanguine or bilious. Our statute, on the contrary, very wisely discriminates in this respect, and says a killing, even without any legal provocation, shall not amount to the first degree of murder, unless it be premeditated and deliberate.

2. The circuit court manifestly erred in admitting the *dying declarations* of the deceased, in the absence of any proof of their having been made in apprehension of death. The ground upon which the judge admitted these declarations, the “necessity of the case,” is believed to be novel and erroneous. Roscoe’s Crim. Law 25-6, 7—and authorities there cited. 1. McNally 386. The opinion of the physician, not expressed to the deceased, could not affect her conscience, or place her under the obligations of an oath. This point is deemed too clear for argument, and is most confidently relied upon for a new trial.

If it should be insisted that the defendant should not ask a reversal on this ground, because the declarations improperly admitted, supports the other defence, that of insanity, the answer is plain. No witness saw the killing—and the jury might have acquitted the defendant on the ground of accident, but for the deceased saying that he shot her by design; which was the only direct evidence on that point. If the jury had thought the insanity insufficiently proved, it is difficult to perceive how that of accident could have been avoided. The deceased was standing behind a bed-quilt, putting bats into it, when shot. The defendant was within a few feet of her. The wound was low down on the left side of the abdomen—so that he must have shot under the bed-quilt. This is inconsistent with a design to kill her: 1. Because a wound inflicted there, was not likely to produce instant death, which a wound in the head or chest would have done; and 2nd, be-

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cause he could have fired his other pistol when he found she was not dead, and thus have cut off all evidence from her.— This he did not do, but sent for a physician, and made no attempt to escape. The insanity under which the proof shows him to have been laboring the morning before, may have caused him to have been handling his pistols without any sensible reason for so doing. *Mania a potu*, being a disease primarily of the nerves, and only affecting the brain secondarily, would render an accidental firing of the pistol in his hand, much more likely. Therefore, but for the declarations of deceased, that it was not so, the jury would, most probably, have decided that the shooting took place by accident, and may have convicted exclusively upon this illegal testimony. It is also insisted here, that dying declarations, are, by the Constitution of this State, inadmissible; which says,—“The accused shall be confronted by witnesses, face to face,” &c.

3. But the great point upon which a reversal is asked in this case, is that of insanity. It is true, there is no positive evidence of insanity at the moment of the killing, if the dying declarations be excluded. But in the great case of *Hadfield* (*Roscoe's Crim. Ev.* 783,) the absurd doctrine of requiring what is nearly impossible, proof of insanity at the very time of killing, is completely exploded. The proof in this case exhibits habitual insanity for several years, and one of the strongest instances of it was manifested to Hiles the morning before the killing. The disease of *mania a potu* usually occurs by paroxysms of from one to three days in duration, and results from intemperance most usually. On Thursday, defendant drank excessively; on Friday morning he was sober but insane, being the commencement of the paroxysm; and the paroxysms always increase in length as they occur more frequently. He had been subject to the disease for years, as Dr. Holt proves, and an attack of medium length would not have subsided before Sunday or Monday after the killing. But there are strong circumstances to prove this, aside from the general nature of the disease. Among these may be mentioned the apparent insensibility of defendant after his wife was shot, and the remarkable fact that he attempted no excuse or defence at

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any time. It is almost impossible to conceive of a guilty man remaining in the presence of the person he had murdered for a day and night, unrestrained, and never once suggesting an excuse for the act. This is madness in the extreme. Roscoe's Crim. Ev. 784; 1 Hale's p. 6, 32; 1 Russ, 8; 5 Mason 28; American Jurist, vol. 3, page 5; Martin & Yer. 147. But the attention of the court is particularly directed to *Ray's Med. Ju.* chap. 24.

The ATTORNEY GENERAL, on behalf of the state, as to the supposed error of his Honor in admitting the dying declarations, cited 2 Russell, B. 6, § 3, pages 636 to 640, top paging, 3d Am. Ed. It is not left to the jury to say whether the deceased thought she was dying or not. That must be decided by the judge before he receives the evidence. John's case, 1 East's P. C. c 5, § 124; note in 2 Russell, *loc. cit.*; 15 Johnson, 286, *Wilson vs. Boem.*

In reply to the argument that dying declarations are inadmissible upon constitutional grounds, he said, that the right of a party accused of crime to meet the witnesses against him face to face, and the admissibility of dying declarations, for the reason that the sanction under which they are made is of equal solemnity with that of statements made on oath, were principles of the common law of like antiquity and authority; that because the former had been questioned and denied in the relentless state prosecutions engendered in England by party animosity, it was thought by the framers of our constitution to be a rule of fundamental importance, and to be worthy of recognition in that instrument. But it was not to be supposed, that because a particular rule of law had, from adventitious circumstances, become invested with the character of a political principle, therefore it annulled a correlative rule, introduced by the same authority, common usage, and founded upon reasons equally cogent.

He said that there was no error in the explanations given by his Honor of what is necessary to constitute murder in the first degree, and cited *Mitchell vs. The State*, 5 Yerger, 340.

Upon the point of the alleged insanity of the plaintiff in error, he referred to the 23d chapter of *Ray's Medical Ju-*

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risprudence, to show that the evidence, upon that point, had not been developed, on the trial, with sufficient detail and precision, to be the basis of a decision. Nevertheless, he admitted, that the fact of the insanity was not destitute of probability. He cited Ray's 24th chapter, and referred to Smollett's remarks on the case of Earl Ferrers, c 33, § 9, of his History of England.

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He added that the testimony was comparatively unimportant, at any rate. It was not relied upon to prove the killing, but only to prove that it was done by design, a fact which the prosecution need not prove at all; since where there is a killing, design is presumed, and the want of it is matter of defence.

REESE, J. delivered the opinion of the court.

For the plaintiff in error, it is insisted, 1. That the circuit court erred in refusing to set aside the verdict and grant a new trial, because it is alledged, that the facts proved on the trial are not sufficient to sustain the verdict.

On attentively considering the proof set forth in the bill of exceptions, we are unable to come to the conclusion, that the evidence does not warrant the verdict. On the contrary, we are all of opinion, that the verdict of conviction is well sustained by the evidence; and indeed properly, and almost necessarily, resulted from it. It were a task neither necessary nor profitable, to refer to the testimony, for the purpose of maintaining, by commentary and argument, the opinion which we have announced.

2. For the plaintiff in error it is insisted, that the circuit court erred in that part of the charge which relates to murder in the first degree; the part of the charge excepted to was as follows—"That to constitute murder in the first degree, it would not be sufficient that the killing was wilful and malicious. It must also have been deliberate and premeditated; that in the absence of passion, or provocation, the length of time during which the prisoner deliberated and premeditated was immaterial; that if there was neither passion nor provocation, and the design to kill was formed, it would make no difference whether that design had been deliberated on but

one moment, one day, or one week; but if the design to kill was formed under the influence of passion, or upon provocation, and the killing ensued before the passion had time to subside, it will only be murder in the second degree, or manslaughter, if the provocation was a sufficient and legal one, as explained to the jury."

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We are all of opinion, that in the charge to the jury above quoted, there is no error. It is maintained by the opinion of this court, in Dale's case, 10 Yer. 552, that in cases other than those, the circumstances of which are specified in the statute, to constitute murder in the first degree, "the killing must be done wilfully; that is, of purpose, with intent that the act by which the life of a party is taken should have that effect—and deliberately; that is, with cool purpose,—and maliciously; that is, with malice aforethought,—and with premeditation; that is, a design must be formed to kill, before the act, by which the death is produced, is performed." The opinion of the circuit court we regard as in exact conformity to the above authority.

3. For the plaintiff it is insisted, that the circuit court erred in permitting the declarations of Mary Anthony, the deceased, made in *articulo mortis*, to go to the jury, as testimony, and this upon two grounds; first, as being contrary to the bill of rights, which secures compulsory process for witnesses in behalf of defendants in criminal cases, and provides, that they shall be confronted with the witnesses against them; and secondly, because it did not sufficiently appear that Mary Anthony was conscious at the time of such declarations of her danger and of impending death.

Upon the first ground of objection, we are all of opinion, that the bill of rights cannot be construed to prevent declarations properly made in *articulo mortis*, from being given in evidence against defendants in cases of homicide. The provision in the bill of rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of our revolution, had been yielded to the liberal or popular party in Great Britain after a

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long contest, and after very strenuous opposition from the crown, from crown lawyers, and if I may so speak, crown statesmen. In this case, as in that of libels and some others, the object of the bill of rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest. That our view of this question is correct, is made manifest by the fact, that after more than forty years from the adoption of our first constitution, this argument against the admissibility of dying declarations, on the ground of the bill of rights, is for the first time made, so far as we are aware in our courts of justice; and if made elsewhere it does not appear to have received judicial sanction in any state.))

2. As to the other ground of objection, namely, that there is not sufficient evidence to show that the deceased knew or thought herself to be in imminent danger of death, at the time the declaration was made; a majority of the court are of opinion that it also is not tenable. The general principle deduced from all the cases is stated, 1 East. P. C. 354, to be that "it must appear that the deceased, at the time of making such declarations, was conscious of his danger; such consciousness being equivalent to the sanction of an oath, and that no man could be disposed, under such circumstances, to belie his conscience, none at least, who had any sense of religion. But such consciousness need not have been expressed by the deceased. It is enough if it might be collected from circumstances; and the court are to judge of this consciousness previous to this sort of testimony.

The declaration in the case before us was made about twelve hours before the death of the deceased; and the physician to whom it was made, states that the wound was a large pistol shot, entering near the navel, and was such a wound as would ninety-nine times in a hundred produce death; that he thought at the time of the declaration that the deceased was fast sinking, but that he had made no communication to her, nor heard any made by any other person, informing her of her approaching dissolution, nor heard her say any thing

concerning her consciousness of her approaching dissolution, only, "that she was suffering great pain, burning heat, and great sickness of the stomach."

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If the dangerous nature and character of the wound, the state and illness of the party, her sinking condition, and her statement of extreme suffering, and of those symptoms which usually precede death, are circumstances from which in any case the consciousness of danger can be collected, they exist in the present case, and would justify the inference of such consciousness. In Woodcock's case, 1 Leach, 503, Old B. 1789, before C. B. Eyre, Ashhurst, J., and Adair, Serg., Recorder, when a woman, who had been dreadfully wounded, and who afterwards died of the wounds made a declaration, the question was, whether it was made under the impression that she was dying. The surgeon said that she did not appear to be at all sensible of the danger of her situation, dreadful as it seemed to all around her, but lay quietly submitting to her fate, without explaining whether she thought herself likely to live or die. Eyre, C. B. was of opinion, that inasmuch as she was mortally wounded, and in a condition that rendered immediate death almost inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations made under these considerations were to be considered by the jury as being made under the impression of her approaching dissolution, for resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. And in Winter's case, 40 George 3d, McNally, 386, before Lord Kilwarden, C. J., and Kelly, J., the declarations of the deceased were received, although she did not intimate that she considered herself in a dying condition, or that she had any apprehension of immediate death, it appearing that she had been absolved, and received extreme unction from a Catholic Priest. In John's case, reported in 1 E. P. C. 1790, from the MSS. of Buller, Judge, it was ruled in the trial, among other things, "that the evidence of the state of the deceased's health, at the time the declarations were made, was sufficient to show

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that she was actually dying, and that it was to be inferred from it, that she was conscious of her situation." The prisoner having been found guilty, this point, among others, was referred to the judges, who, at a conference in Easter Term, 1790, all agreed that it ought not to be left to the jury to say: whether the deceased thought she was dying or not, for that must be decided by the judge before he receives the evidence. "And that if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence."

It is obvious that this rule or principle, so distinctly stated, does not mean that the inference may be drawn from the mere fact, that the wound, in the opinion of the man of science, was in point of fact mortal; but that the nature of the wound or the state of illness should be such as to affect the knowledge, and control the opinion of the dying person himself, as to the danger to which he stands exposed; for in that very case, where the wounds were bruises and contusion from blows or kicks, all the judges but two held that there was no foundation for supposing that the deceased considered herself in any danger at all. But in the case before us, the dreadful nature of the wound, the state of illness as proved by the physician and declared by the deceased herself, were such as could not leave her, or any rational being in doubt as to her being in great danger of immediate death.

The evidence in question, in reference to the state of facts shown upon the record, was of very slight importance, if of any, on the part of the state; but we lay no stress upon that consideration.

Let the judgment be affirmed.

NOTE. In the 21st vol. of the American Jurist, 468, there is a brief notice of a dissertation by C. I. Mittermaier upon *criminal imputability*. In this dissertation, the author, to arrive at a solution of the questions—By what signs is it to be known, that the agent has not a knowledge of the morality of his act, and the liberty to abstain from it? What degree of injury of the intellectual faculties is necessary to destroy imputability?—lays down the following practical

RULE.

In order to withdraw the agent from the imputability of his act, it is not sufficient that his mind should for the moment be blinded by a transient cause—

it is necessary, that the *feeling* which impels him to crime should arise from a *disease*;

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That this disease should be its *only* source;

And that its power should be so irresistible, that the liberty to act ceases completely to exist.

When any form of insanity is relied upon as a defence, the inquiries to be made and prosecuted by the triers, according to this rule, would be—Was there a disease? If there was, what was the degree of it? And the solution of these questions, it is manifest, would require a painful collection and investigation of minute and various facts, to be derived, in most instances, from unskilful witnesses, and involving a scrutiny of the prisoner's past life. Should the disease be established, then the inquiry must be made—was the prisoner impelled to the act by the specific *feeling* which arose from the disease and that only? For in cases of strict *monomania*, the party is perfectly sane except upon a single point or subject; and hence *monomanics* are as capable of crime as others, except in the case only where they act under the influence of the feeling produced by the disease.

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SALE OF CHATTELS. *Condition—vendor's lien for the price.* On a verbal sale and delivery of a slave at a fixed price, to be paid on a day certain, but, *until paid, the title to remain in the seller*, the payment is a condition precedent, till the performance of which, the property does not become absolute in the buyer, nor liable to his debts.

SAME. *Chancery—vendor's lien how enforced.* A trustee, to whom such buyer conveys the slave, to secure a previous creditor, takes him subject to the seller's lien, which will be enforced; in equity, upon the seller's bill against the buyer, his creditor and trustee, by a decree, that they pay the price at a short day,—also, that the sale be rescinded, and the slave re-delivered.

About the 24th of April, 1837, Gambling sold Read, Hannah, a female slave for \$1200, made him a bill of sale of her, and delivered her into his possession. For 800 dollars of the purchase money, Read gave Gambling his note payable on the 1st of July, 1837, and to secure its payment gave him a bill of sale of another negro woman Dilcey and her child, Henry, conditioned that if Read paid the 800 dollars when due, the bill of sale should be void. The remaining 400 dollars were secured by a note, executed by Read and another as his surety, payable by the 1st of July, 1837. Hannah had a young child, and her distress at the separation from it induced Read to propose to purchase it; and it was agreed that he should have it for 150 dollars, payable by the

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25th of December, 1837, for which he gave Gambling his note, and the child was delivered to Read, but no bill of sale was made him; and in several conversations upon the subject immediately after the transaction, he stated that the right of property in the child remained in Gambling till the money should be paid.

Being indebted to Zachariah F. Green, for the price of Dilcey and her child, and other property purchased of him, Read, on the 29th of April, only five days after the purchase of Hannah and her child, made a conveyance of her and her child, and Dilcey and her child, to William Trousdale, in trust, that if he failed to pay Green 1642 dollars, for which he executed his note of the same date at two months, then Trousdale was to sell the negroes for cash, and pay the debt.

To prevent the sale of the child under this deed of trust, and its removal beyond the jurisdiction of the court, Gambling filed his bill in the chancery court of Gallatin, on the 17th of July, 1837, stating the above facts, suggesting the embarrassed condition of Read, and praying that Read, Green and Trousdale might be enjoined from selling the child; that it might be delivered up to the plaintiff, to be retained by him as a security for the payment of the 150 dollars, and for an injunction, *ne amoveas*, &c.

His Honor Judge BROWN, of the 6th circuit, gave a fiat for the writs, and they were issued, and the sheriff took the child into custody, and delivered him to Gambling, and took his forthcoming bond, dated the 21st of July, 1837.

The defendant Read filed his answer on the 15th of August, and Green on the 13th of September, 1837. Read's answer states the facts substantially as above detailed, insisting, however, that the title to the child passed to him by the delivery without a bill of sale. Green denied any knowledge of the fact that Gambling had reserved the title.

Testimony was taken, which clearly proved that the reservation had been, in point of fact, made, and that the purchase money of the child was unpaid.

The case was heard at October term, 1838, before his Honor Chancellor BRANLITT, who decreed that the defend-

ants should be divested of all right, &c. in the child; that they should be perpetually enjoined from selling him under the deed of trust, &c. From this decree Green prosecuted a writ of error.

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WHITE, for the complainant, said the question in this case is, whether this was an absolute or conditional purchase from complainant, of this boy, the son of Hannah? Defendants, by way of defence, say that the purchase was absolute and unconditional, for the price of \$150. This is their defence, which they must establish, for they admit the negro to have been originally the property of complainant. 14 John. 63; 6 Yer. 108. They fail to show this, either by producing a bill of sale, or proving a parol purchase and delivery of the negro by witnesses.

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How would this matter stand in relation to Read, supposing him to be the only party? The facts admitted by him in his answer, show it could not have been an absolute sale. He first purchases Hannah at \$1200, of which he pays \$800 in Dilcey and her child, and gives personal security for the other \$400. He likewise takes a bill of sale for Hannah. Do not these facts show that Gambling would not have made an absolute sale of this boy, unless the money had been paid or security given? And further, if it had been an absolute sale, would not a bill of sale have been required and executed, as was done for Hannah, the mother of the child? But the evidence of the witnesses conclusively show that this was a conditional sale, and that Gambling had not parted with his title to the property.

Does Green stand in any better situation than Read? Certainly not. All that he can claim under his mortgage is whatever interest Read had in the property. With regard to personal property, it is a question of right, and not of notice; 1 Johnson, 479; but situated as Green is, from the facts in this case, the law would impute notice. He must have seen the bill of sale for Hannah the mother; this would put him on his guard about the child, and he would be required to investigate the title at his peril.

GUILD and COOK, for respondents, argued, that the proof shows that the transaction was a verbal mortgage, and not a

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conditional sale. If a mortgage, then, not being in writing, it was void, as to subsequent purchasers without notice. 1784, c 10, § 7, *Payne vs. Lassiter*, 10 Yer. 507.

Green is a *bona fide* purchaser for full value, without notice, and a court of equity will not relieve against him. The title, to say the best of it, is doubtful, and the court will leave the parties to their remedies at law. *Loftin vs Espy*, 4 Yer. 84. Here Gambling has got two negroes, Dilcey and child, of defendant, the consideration of the deed of trust; and it would be inequitable to give him the child, also, and leave Green, an innocent purchaser, the sole loser.

TURLEY, J., delivered the opinion of the court.

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In this case, the proof shows satisfactorily, that Jesse Gambling, the complainant, sometime about the 24th of April, 1837, sold to John Read, one of the defendants, the negro child, Marcus, the subject of controversy, for the sum of 150 dollars, to be paid on the 25th of December following, and retained the right and title in himself as security for the payment of the purchase money; that, at the same time, he sold also to said defendant, negro woman Hannah, the mother of the child, and permitted the possession of the child, it being but three months old, to be taken by the defendant together with the mother, the purchase money of whom had been secured, and the title parted from; that on the 29th of April, 1837, John Read executed a deed of trust on the negro woman and child, to secure a debt previously contracted to his co-defendant, Zachariah F. Green, and that the purchase money for the child has never been paid to the complainant.

Upon this state of facts, the question presented for consideration is, whether the vendor of a negro can permit the vendee to take possession, and retain in himself the title to secure the payment of the purchase money? It is not denied that as between himself and his vendee he may, but it is said, that as between himself and a subsequent purchaser from his vendee, without notice, he cannot, unless the contract be reduced to writing and registered as a mortgage.

The maxim, *careat emptor*, applies as well to purchasers

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of negroes as other personal property; and of course, if the person from whom the purchase is made, have not the legal title, the purchaser can acquire none. The possession of personal property is only *prima facie* evidence of title, and will not protect a purchaser against the claim of the true owner, except in a few cases provided for in law, where it has been of such a character as is calculated to impose upon creditors and subsequent purchasers, which need not be specified, as this is not one of them.

The defendant, John Read, then, having acquired by his contract with complainant, no legal title to the negro in dispute, could convey none to his co-defendant, Zachariah F. Green. There is, we think, nothing substantial in the argument, that the contract between the complainant and defendant Read, ought to have been registered as a mortgage. We do not think that it is a mortgage; although so far as the property is held to be a security for the payment of the debt, it is somewhat similar. In the case of a mortgage, the title passes from the mortgagor to the mortgagee, to secure the mortgagor's debt, who may either take possession or not, at his pleasure. But in the case now under consideration, the title to the property was never parted from, but was retained by the owner, to secure the payment of the money contracted to be given for its purchase. There is no law requiring such contracts to be registered. Though partaking in many respects of the nature of mortgages, yet they are not mortgages; and the statutes requiring the registration of mortgages cannot be made to apply to them.

The complainant is therefore entitled to relief, but not to the relief given by the chancellor. For inasmuch as he holds the legal title to the negro boy, only as a security for the purchase money, the defendants, upon the payment thereof, are entitled to keep him. The right, therefore, ought not to have been divested by the decree, but they should have been directed to pay the money in some reasonable time, and in case of failure, the contract should have been rescinded, and the negro restored to the complainant.

The decree will therefore be modified, in this respect, and the time of two months given to defendants, after they shall

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have been notified of this decree, in which to make payment of the \$150, with interest from the 25th day of December, 1837.

Decree modified.

NOTE. See *Haggerty vs. Palmer* 6 Johns, Ch. R. 437.

Upon the subject of the seller's lien for the price, upon a conditional sale of chattels, see 2 Kent's Comm. 496, 497, 498, 3d Ed., and the authorities there cited; to which add, *Dupree vs. Harrington*, 1 Harper's R. 391; *Wheeler on Slavery*, 70, S. C.; *Owenson vs. Morse*, 7 T. R. 54; *Harris vs. Smith*, 3 Serg. & Rawle, 20.

WEEDON vs. WALLACE et al.

MAINTENANCE. *Champerty. Contract to divide recovery with attorney or other agent prohibited by act of 1821, c. 66.* An agreement by a plaintiff in a pending suit to give an agent, whether his attorney at law or "other person," for conducting the suit, a part of his recovery, is champertous under the act of 1821; and, on the fact appearing, in either of the modes pointed out in the law, the suit must be dismissed.

SAME. *Same. Construction of the phraseology of the law.* The words "other person," employed in the prohibitory clause, were not dropped in the clause providing for the dismissal of the suit, and prescribing the method of proceeding, with the design to confine the operation of the law to attorneys, but was the result of negligence in the draftsman.

John, Augustine, and George T. Weedon were then only children of George Weedon of Culpepper county, Virginia, who died there many years ago. Before his death, John had settled in Montgomery county, Ky., and till that event, Augustine, and George T., the latter of whom was idiotic from nativity, resided with him. After the death of George, the father, John returned to Culpepper, and a division of the deceased's negroes, some of whom are the subject of this suit, was made between the three brothers; and it was agreed between John and Augustine that if John would take care of, and support and provide for George T., till his death, Augustine would let John have his interest in the negroes assigned to George T.

John thereupon took the negroes allotted to him and his idiot brother, and the idiot to Kentucky, where he kept them till his own death, before which event he had made a will, but

what were its provisions it does not appear. He had never been married, but lived in adultery with a Mrs. Woods, who, it seems, was made his executrix; and who in that capacity, claiming under the will, took possession of all his negroes, and also of those that had been assigned to his idiot brother. Of course, Augustine and George T. were John's heirs at law.

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After John's death Augustine went to Kentucky, and finding the negroes in the possession of, and thus claimed by, Mrs. Woods, on the 24th of January, 1831, he employed Amos Davis of Mountsterling, as his attorney to "prosecute," as the written agreement between them runs, "a suit for certain slaves on behalf of G. T. W., which slaves have been devised to sundry persons by the will of J. W., deceased. The said Davis is to pay all cost in the prosecution of said suit, and to pay himself out of the judgment for cost if successful. And if the suit shall be terminated in favor of said G. T. W. to the extent of one half the slaves, I bind myself to pay said Davis \$ 200, and if a less interest, then in proportion; and if a negro of the value of \$200 should be tendered to said Davis instead of \$200, he shall be bound to take him."

The suit was instituted, and Augustine W. being unable to carry it on, employed the defendant, Shackleford, his son-in-law, to conduct it; and gave him authority to compromise the suit and sell the negroes, and out of the proceeds pay himself \$300 for his services, over and above his expenses.

In the fall of 1831, Shackleford accordingly made a compromise, but Mrs. Wood refused to deliver up the negroes until Shackleford procured a bond to be executed by Augustine and his children, with sureties, to indemnify her against any subsequent demands to be set up to the negroes left by John Weedon, by any of his heirs at law.

Shackleford being unable to give the security required in Kentucky, returned home, and procured William H. Hogans of Davidson county, to go to Kentucky, and be himself, and procure his brother, who resided in Kentucky, to become, surety in the bond which Mrs. Woods required. This bond was executed in March, 1832, by Shackleford and W. H. Hogans; and the latter instructed his brother not to sign it till Weedon and his children should first give him a bond to indem-

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nify him against his liability to Mrs. Woods, which bond was executed by all of them after their return to Tennessee.

The negroes were divided between Shackleford and Mrs. Woods by arbitrators, after which, and after the execution of the bond to indemnify her, she delivered to Shackleford those assigned to him; namely, David, Ann and her child, and Martin. Shackleford did not bring them home, because Martin had been hired out at the beginning of the year for twelve months, and Ann was pregnant and could not be brought away.

After Shackleford returned from Kentucky, and after the whole matter had been reported to complainant, in fact *after he had executed the bond to indemnify Hogans*, Shackleford sold the negroes to the defendant Wallace for 800 dollars, that being the full value of them. As to the fact whether Augustine Weedon gave him authority to make the sale, there are in the pleadings mutual affirmations and denials; and the proof was conflicting.

In January, 1823, Shackleford employed A. G. Campbell to go to Kentucky for the negroes, and Davis delivered him three, Martin, Ann and her child Caroline; the old negro, David, and Ann's child, born previous to 1832, having died after the compromise and delivery of the negroes by Mrs. Woods.

Upon Campbell's arrival with the negroes about March 1833, complainant procured himself to be appointed guardian of George T.; and about the 28th of the same month filed a bill in the circuit court of Warren, in the name of the said George T. by himself as guardian, against Wallace and Shackleford, in which he states that John Weedon *persuaded* the idiot to go to Kentucky with him, that he had died and had *willed away the negroes of said* idiot to a certain Mrs. Woods and her children, &c. &c. This bill was dismissed, because neither of the defendants were residents of Warren county at the time it was filed.

George T. Weedon, the idiot, died in March, 1834, and complainant is his only heir at law and distributee.

On the 11th of October 1834, he filed this bill in the Chancery Court at Franklin, against Shackleford and Wallace,

praying to have these negroes delivered up and an account of their hire.

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He alleges that he employed S. to go to Kentucky "to get possession of the negroes, &c. and to bring them to his, complainant's house, in Warren county, and for his services he was to be compensated liberally out of the *hire* of the slaves."

Shackleford, in his answer, swears that he was to have \$300 for his services, and all expenses paid, and that the money was to be raised by a *sale* of the negroes, not by hiring them.

There was evidence showing that complainant had repeatedly directed Shackleford to sell the negroes while the suit was pending; to sell them in Kentucky and never bring them home, because the idiot would make more fuss about them than they were worth. There was no evidence that complainant ever said, in Shackleford's presence, that he was to be paid by the hire of the negroes. There was evidence that he often said, in the family, that the negroes were to be *hired* to pay Shackleford; and that after they were sold to Wallace, he directed Shackleford to say, in the presence of the idiot, that they were *hired*, not sold.

After this bill had been filed, Lusk Colville came to be an active agent of the complainant in conducting the suit. Whereupon the defendant filed a cross-bill to discover the nature of his interest, and of the contract between him and complainant. The answer of Colville and complainant denied champerty, but set out a contract, and averred that it was the only contract between them. It is in the shape of a bill of sale by complainant Weedon to Colville, of all the negroes, for \$500, conditioned that whereas Weedon had brought suit for the negroes, and Colville had become his surety for the prosecution thereof, and for the attachment and injunction, and *was responsible for the lawyer's fees and expenses of conducting the suits, and for other charges incident thereto, and Weedon had borrowed from him \$100 in cash; if he indemnified C. and saved him harmless, and paid him all moneys borrowed, and for all expenses then, or subsequently to be, incurred, and all advances of money afterwards made, then the sale was to be void, else to remain in full force.* The parol proof respect-

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ing the interest which Colville was to have in the negroes is stated in the opinion of the court.

At October Term of the Chancery Court, 1836, the cause was heard before his Honor, Chancellor BRAMLITT, who advised till April Term, 1837, and then declared that the negroes were the property of A. Weedon, as representative and heir at law of the idiot; that he was entitled to have them delivered up, upon payment of the expenses incurred in obtaining possession of them in Kentucky, and bringing them to Tennessee; that he was not precluded from having relief by champerty, &c. And concludes by directing an account of said expenses, including 300 dollars as compensation to Shackelford; also of the hire of the negroes received by the defendants; and that the Clerk and Master report the same, and the names and description of the negroes.

On the coming in of the report, at October Term, 1837, the court ordered that the complainant should pay the balance reported to be due the defendants, being the difference between the hire of the negroes and the expenses of recovering them and bringing them to Tennessee, by the 1st of January, 1838; and if not paid, that the clerk should sell so many of them as might be necessary to make the sum in question, and pay the residue, if any, to complainant, and deliver to him the rest of the negroes.

From this decree the defendants appealed in error.

January 19,

COOK, for the complainant, said—It is admitted by the pleadings and the proof is that the legal title to the property is in complainant. The sale in the lifetime of the idiot was void, and was made also in fraud of his rights. Wallace knew the property belonged to the idiot, and that he was therefore acquiring no title, but was purchasing in fraud of the idiot's rights.

Upon the death of the idiot the right vested in complainant as his administrator.

This bill is filed upon the legal title in lieu of the action of detinue, upon the jurisdiction of this court asserted in *Henderson v. Vaultz and wife*, 10 Yer. 30, and other cases.

Then suppose the action of detinue brought, how could the recovery be resisted?

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Surely not by showing that complainant in his individual capacity, connived at, or assented to, the sale by Shackelford, when they were all acting with their eyes open, and upon a subject over which they had no power. Wallace might, perhaps, recover the consideration paid, but he has no title to, or lien on, the slaves. They are in the hands of the administrator as a trustee for the payment of debts, &c.

If Weedon had sold the negroes and received the full price; no estoppel would apply, because he owns in a different right and as a different person. An estoppel as to A. Weedon would not bind the representative of George T. Weedon. They are different persons and claim in different rights.

2. There is no champerty in the case. Here a mortgage is given to indemnify Colville as surety for costs and attorneys' fees, and for money advanced and to be advanced, but no agreement to advance any more. This is a written agreement made about the time of the institution of the suit, and shows clearly the agreement of the parties. The defendants in their answer say this is all the agreement. Now, there doubtless had been some previous conversation on the subject of the agreement, and a suit had before been pending.—The parties, before they consulted their attorney, may have supposed they could make a champertous agreement, and may have spoken of it in that way, and hence the statements of some of the witnesses. But when they come to make the final agreement they steered clear of champerty, and only took a security.

An assignment of a chose in action is void at law, but valid in equity, and this is the case though a suit is in immediate contemplation, or actually pending. But the assignment must be either entire or not at all. An assignment of a part for prosecuting the suits is champertous, or perhaps an absolute assignment of the whole for that purpose alone.

In order to make it champertous, it must be a giving of the thing, or a part of it, absolutely, for maintaining the suit. Now a mortgage is a mere security for money advanced; the estate still, in equity, belongs to the mortgagor; and upon payment of the money the estate is discharged of the lien.—This money, too, the mortgagor is bound to pay, let the suit

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go one way or the other. This then cannot be champerty. 4 Black's Com. 135; 2 Co. Lit. 164; 3 Young and Jerv. 129; 3 Cowen 623; 2 McCord's Chan. Rep. 358, 392; 2 Sim & Stewart 244; *Hartley v. Russell*, 1 Con. Eng. Ch. Rep. 439; 1 Swanst. Rep. 56, *Wood v. Griffiths*; 2 Story's Eq. 311 to 317; 9 Price, 79; 11 Law Magazine, 375-6-7; 2 Mylne & Keene 591; 3 Eng. Con. Chan. Rep. 140; 5 Bingham, 309.

3. There is no maintenance in this case for the above reason, and for the following:

1. It is not maintenance to assist a poor neighbor to prosecute his suits. The object of the law of champerty was to prevent the rich from oppressing the poor; a defence, therefore, of the poor, is not in the reason of the law, and as such not within it. 3 John's Ch. Rep. 508 to 518, *Penrin v. Dunn*.

4. The court would not dismiss a poor man's suit even if he were within the champerty law, because he can, by statute, prosecute his suit under the pauper law.

5. So far as maintenance is concerned, the suit ought not to be dismissed, because the maintenance suit was not brought on for trial before the original suit, and no injunction was obtained to stop that suit, by similarity to motions to dismiss for want of security for costs, &c.

6. The act of 1821 does not authorise the dismissal of the suit for maintenance, (or maintenance in nature of champertous conditional contracts,) but only for champerty. That act and the pauper law must be construed *in pari materia*, allowing poor people every facility for the prosecution of their rights.

The act, in words only, applies to champerty in its most confined sense, being for a part of the thing, or for more or less, dependent on the event of the suit, or amount of recovery.

F. B. Fogg and Mergs for the defendant, argued—

December 20.

1. The St. of West. I. c. 25—2 Inst. 207—enacts that no person shall maintain pleas, suits, or matters hanging in court, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them. (A.D. 1276

8 Ed. 1.) See also West. II. c. 49, 2 Inst. 484 (A. D. 1285, 13 Ed. 1.) *Articuli super Chartas*, ch. 11, 2 Inst. 562, and particularly the commentary, which shows that a feoffment, *hanging* the plea, or the like, to maintain the tenant, is champerty, though given to a lawyer in lieu of his fee. (28 Ed. 1, A. D. 1300. (Statute of Champerty 33 Ed. 1, St. 3, A. D. 1305. 32 H. 8, ch. 9. (A. D. 1540.)

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See all those statutes, the first in the 1st vol. of the Statutes at Large, 50, 111, 144, 150, and the last cited, 2 Sts. at Large, 280—Ruffhea's Ed.

2. This paper is drawn in the form of a mortgage, and it is undoubtedly true that a person interested in the subject matter of the suit, as a mortgagee, though he be no party to the suit, may expend money in supporting the title, without being guilty of maintenance. 1 Peere Williams 375, *Sharp vs. Carter*; 1 Powell on Mortgages, 203. But this is where there is no adverse possession, and the party becomes interested in the property, as mortgagee, or otherwise, before the commencement of the suit,—not where a party takes a mortgage of property adversely possessed, and for which a suit is pending, as a security for his maintenance, and as a consideration to induce him to maintain the suit. *Wickham v. Conklin*, 8 John's R. 170. If it be decided that counsel may secure their fees by taking mortgages of the property in suit, the law against champerty is effectually repealed; and a device is discovered whereby the statutes may be evaded.

The statute of 28th Ed. 1. ch. 11, enacts that *no person shall take upon him the business that is in suit*; nor none upon any such covenant shall give up his right to another; and if any do, &c. But it may not be understood hereby, that any person shall be prohibited to have counsel of pleaders, or of learned men in the law for his fee, or of his parents or next of kin. 2 Inst. 562. Upon this exception in favor of lawyers, Lord Coke says—"Their advice and direction in their profession of law is excepted: but to take *any* estate in the land, hanging the suit, for maintenance, is to become a party, and is in no sort allowed by this act." Id. 564. *A fortiori*, no other persons are allowed to take *any* estate, &c., the comment being written to show, that the exception was limited to

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professional advice, to give which is not maintenance, but to take *any* estate in the property in suit, for any purpose, even to secure remuneration therefor, is champerty, the worst species of maintenance.

JAMES CAMPBELL, in reply, argued that, 1. Upon the original bill, answers and evidence, it is confidently believed no difficulty can be raised in bar of complainants decree, or to prevent an affirmance of the chancellor's decree. Complainant is here asserting the rights of George Thornton Weedon to the negroes in controversy. He was an idiot as is admitted on all hands and proved, and was guilty of no fraud and could commit none. Supposing complainant had told Shackelford in the life time of Geo. T. Weedon, as is alleged, to sell the negroes, and in pursuance of such authority he did sell them, that would not prevent the assertion in this court of Geo. T. Weedon's right to the negroes. Supposing that the first suit in the name of Geo. T. Weedon had not been abated, and Geo. T. Weedon had lived, and the suit had progressed in his Geo. T. Weedon's name, a decree must have gone in his favor for the negroes. Such a case would have been too plain to admit of a doubt. What is the case now presented? Precisely the same in principle. Here is George T. Weedon's representative asserting his right in this court. This view of the case furnishes an answer to another argument of defendants. They say, if it was a fraud in Wallace and Shackelford to speculate upon the property of this idiot, it was a fraud in complainant to tell Shackelford to sell the negroes, and he that hath committed iniquity shall not have equity, &c. Could this argument have been used if Geo. T. Weedon had lived to prosecute the suit in his own name? Surely not. And as it could not be used there, neither can it be urged successfully here. We claim the negroes in right of Geo. T. Weedon, and he hath committed no iniquity; but the truth is, there is nothing censurable in the conduct of Augustine Weedon, except so far as he was misled and imposed upon by the conduct of Shackelford himself. Although Shackelford now pretends he sold the negroes under an authority from Weedon, yet the transaction itself shows he did not act for and on behalf of Weed-

on, or for his benefit, but in his, Shackelford's, own name, for his own benefit. There is not a color of a pretence that Shackelford thought he was acting for Augustine Weedon in the sale, or that Wallace considered he was buying the negroes from Augustine—such an idea never entered the head of either of them. The plan then was, not to shelter themselves under any pretended authority from Augustine Weedon, but to sell the property of the idiot first, and then to cure all up by means of a guardianship to be obtained of this idiot, and a settlement of accounts with commissioners.

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2. Defendants next come forward and file a cross bill, in which they charge that Colville is maintaining Weedon in the prosecution of this suit, for which he is to receive part of the negroes in controversy, if he succeeds, which, the bill alledges, is corrupt and champertous. To this defendants answer and positively deny the charges, and set forth a mortgage, which contains the only agreement between them, and which is not corrupt or champertous. The first thing to be considered is, are the answers disproved? Here the rule certainly is applicable, that we should reconcile the testimony if we can reasonably do so.

The whole of the conversation between Weedon and Colville, detailed in evidence, taken together, shows conclusively, that Weedon understood himself, not as saying that he had made a contract with Colville, by which he was to give him half or any other part of what was recovered, but only as speaking of what he intended to do. He intended to be liberal with Colville if he gained the suit. There was not the scrape of a pen, that is, there was no contract between them; for he said further, "I have said nothing amiss—if there is any contract let them prove it." He said he was ignorant and poor and unable to prosecute the suit himself and therefore had employed Colville, &c.

Now, with this view of the testimony, let us advert to Colville and Weedon's answer. They both are called upon to state, and do state what contracts existed between them in relation to champerty and maintenance, &c. And they show a written mortgage executed by Weedon and Colville, and they say here is the contract and all the contract. Colville

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is proved to be an intelligent man, of some legal information; it is clearly inferrible he knows all about champerty. Now is it conceivable that he and Weedon would enter into a contract such as is shown by that mortgage, and then afterwards enter into another and a different one, that might endanger the success of the suit.

3. But the agreement, as proved, is not champerty, either by the common law or by statute. It is not champerty by the common law for a man to help his poor neighbor.

4. Neither is it champerty by statute. See Act of 1821, c 66. The second section of the act only embraces cases of attorney and client agreeing to divide the recovery. If it is not champerty by statute, it must remain as it was at common law, and by that law it is not champerty.

GREEN, J. delivered the opinion of the court.

It is unnecessary to discuss the merits of the original bill in this case, because, after the most mature deliberation, the court is constrained to dismiss the cause on account of the champertous contract between the complainant Weedon and Colville, his agent for prosecuting the suit.

Where a right to recover is clearly established on the part of a complainant, as a majority of the court think, is done in this case, we cannot but feel great reluctance to dismiss the suit and thereby cut off the means of recovery altogether, because of an act, not in itself immoral, but contrary to public policy, and therefore illegal. But however reluctant we may feel, when a case embraced by the act of assembly is clearly made out, we have no alternative, but to pronounce the law.

The proof places the existence of a contract by which Colville was to have for his services a share of the negroes, in case Weedon recovered them, beyond doubt. John Pendleton says, Weedon told him that "Mr. Colville was to attend to it, and if he gained the suit, he was to give him half." Arthur Warren told him, "that he had agreed to give Mr. Colville half what they could obtain." H. D. McBroom states, that in a company of several persons, Weedon mentioned the suit, but witness does not remember his words;

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but Esquire Taylor told him, that he talked too much—you will injure yourself, somebody will take the advantage of you by talking as you do. Mr. Weedon then said, that he had not said any thing amiss. Esquire Taylor said, you have said enough now for your suit to be thrown out of court, if the opposite party knew it. Mr. Weedon said, he had a right to employ any body he pleased to do the business for him, as he was not able to do it himself. Mr. Weedon further said, there was not the scratch of a pen between him and Colville, but he, Mr. Colville, should be well paid for his services, and if there was any contract, let them prove it.

The statement of the two first witnesses is direct and positive, and admits of no explanation, but if it needed confirmation, the evidence of McBroom is strongly corroborative of their statement. Weedon had said so much about the contract between himself and Colville, that Esquire Taylor reproved him, and told him, he had said enough to throw his suit out of court. Weedon does not, even when thus warned, pretend to deny, that there was a contract for Colville's services, but said, he had a right to employ whom he pleased to do his business; that there was not the scratch of a pen between them, and if there was a contract let them prove it. Now if there had been no contract, he would at once have denied the existence of any, and would not have evaded the matter, by saying, there was not the "scratch of a pen, and if there was a contract, let them prove it." It is clear, therefore, that there was a contract other than the mortgage, by which Colville was to give his personal attention to the prosecution of the suit, and in case of success, was to receive a part of the thing in litigation.

2. The next question is, whether such contract is champerty, by the act of 1821, c 66, and is of the character, upon proof of the existence of which, the court is required to dismiss the suit?

It is contended by the defendant that the act of assembly only applies to attorney's at law, and that, as Colville is not an attorney at law, he is not to be affected by it. The second section of the act provides, that "it shall not be unlawful

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for any party plaintiff, or intending to be a plaintiff to any suit at law or equity to promise or agree to give any greater or less portion of the thing in litigation, upon any contingency, or upon the event of the suit; and if any practicing attorney, or other person, with the exception contained in the ancient law, shall hereafter enter into any understanding, promise or agreement with any person who may have already brought suit in any of the courts of this state, or who may hereafter bring suit, or be about to bring suit in any of the courts holden in this state, such contract is declared to be void and of no effect. And upon the fact of champerty, or other unlawful contracts being satisfactorily disclosed to the court, where such suit may be depending, in either of the ways herein-after mentioned, the suit shall be by the court dismissed; and the attorney or attorneys so entering, after the passage of this act, into such understanding or agreement, shall be by the court stricken from the list of attorneys, and shall be disqualified to practice in any of the courts of this state for the term of five years."

The act then goes on to provide, that a bill for discovery and relief may be filed against the party claiming title, and his attorney; or, that the defendant may exhibit interrogatories to the plaintiff, his agent or attorney, for the discovery of the matters that are made unlawful by the act.

That this act applies to other persons as well as attorneys, is so manifest, that it does not admit of a doubt. In the first part of the second section above quoted, it provides, that if any practising attorney, or other person, shall make the contract prohibited in the act, the contract shall be void; and upon the fact appearing in either of the ways thereafter mentioned, the suit shall be dismissed.

Now, although in the subsequent part of the section in which the character of the proceedings to be adopted is pointed out, the words, "other person," are not used, still, as it has been declared, that if such person should make the contract prohibited by the act, the suit should be dismissed, the obligation to dismiss it is imperative upon the courts. The method thereafter pointed out applies to such "other persons" as well as to attorneys.

But to put the matter beyond doubt, it is provided in this same section, that the interrogatories may be exhibited "to the plaintiff or plaintiffs, their agent or attorneys." So in the fourth section it is provided, that the interrogatories shall be answered by the "plaintiff or plaintiffs, or their agents," leaving out attorneys. It plainly appears, therefore, that the omission to mention "other persons," at some of the places where the word attorney is used, was the result of mere negligence in the draftsman of the act, and not with design to confine its operations to attorneys. A majority of the court therefore think, that it is imperatively the duty of the court to dismiss the complainant's bill.

Let the decree be reversed and the bill dismissed.

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UNDERWOOD vs. DISMUKES.

LEGACY. *Vesting of favored in law, and why.* The vesting of legacies is favored in law. Generally because the law will not intend that a *testator* means to die partially *intestate*. Especially, of those to children, on the presumption that a testator naturally desires their families to succeed to their interests:—and of those to others, because the tying up of property is inconvenient to the legatees, and against the interest of society.

SAME. *Indicia of legacy being vested.* Giving the intermediate interest of a pecuniary legacy is so clear an index of intent to vest the property, as to overcome the strongest formal and verbal connection of the estate with the time of payment. No, where the testator's *whole real and personal estate* is vested in trustees, to be used for the support and education of his family till a specified time, and then to be equally divided amongst his children and their heirs,—the children have, in the *profits*, a vested right of present common enjoyment, and in the *corpus* of the estate, a vested right of future several enjoyment.

SAME. *Construction.* The arguments are drawn from the several parts of the will.

Thomas Royster of Goochland, Virginia, died in the year 1807, seized and possessed of a tract of land there containing 383 acres, and of divers slaves and other personalty. He left a widow and eight children. He made a will which was dated the 14th of May, 1807, and admitted to probate in September following; and letters testamentary were issued to his executors, David Royster, Anderson Royster and Paul Dismukes, of whom the first and last named alone acted in

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the administration of his estate. It, among others, contained the following provisions:

"I desire that the lands whereon I now live, be sold by my executors, hereinafter named, at public auction, upon such terms as they may direct; and that the proceeds of such sale, together with what money I may have, and all the outstanding debts due me, may be laid out in the purchase of another tract of land by said executors, and a deed taken for the same to all my children and their heirs. And it is my further will and desire that my wife, Agness Royster, shall enjoy the lands so purchased during her natural life,—as also, all my other property, which may not be disposed of by my executors, as is hereinafter directed.

"It is also my desire that my executors shall and may, from time to time, at their discretion, sell on such terms as they may deem expedient, any part of my perishable estate. And that they reserve a sufficiency from my estate to support and raise my family until a division of my estate shall take place as is hereinafter directed. I also desire that my sons be put to some trade by my executors, that (they) may become useful to themselves and society; and that my younger children may get some sort of an education; and that my executors lay out the profit arising from my estate, after supporting my family and educating my children, at their discretion, for the benefit of my estate. *And after the whole of my children shall arrive to manhood; or so soon as my two youngest children arrived to the age of eighteen years, or marriage, then I direct a division of my estate to be made amongst all my children and their heirs, as equally as the nature of the case may admit of:* reserving to my wife a sufficiency of my estate, if she be then living, to live on during her life, both real and personal; so that she cannot suffer for want of any thing in the opinion of my executors,—and the reserve of my estate so made her by my executors, at her death, shall be equally divided among all my children and their heirs. It is my further will and desire, that if any part of my estate can be conveniently spared, in the opinion of my executors, before a division of my estate, as first directed, among my children,—a loan may be made by my executors of such property as they

may think proper, to such of them as may marry, which shall be brought together, if living at said division, and divided as above directed, always taking care to keep a sufficiency for raising the younger children."

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Prudence, one of the testator's daughters, intermarried with William Underwood, and had issue, the complainants, Julian J. and Virginia M.; and Betsy, another of his daughters, intermarried with Robert Rutherford. The family removed from Virginia to Kentucky, where the executors had purchased for them a tract of land. David Royster remained in Virginia, where he managed the affairs of the estate, and Dismukes removed to Kentucky, and became the principal acting executor. Two negroes were loaned to Underwood, who, having become embarrassed, on the 3d of January, 1818, entered into a sealed agreement with Dismukes, in which he engaged to deliver up the negroes to Dismukes, who was to hire them out, allowing him the hire till the final division of the estate. And, reciting that Dismukes had loaned him \$1026, to be paid so soon as the possession of the negroes should be delivered to Dismukes, he stipulated that Dismukes was to have the control of the negroes till that loan should be repaid. Underwood's wife was already dead, and he died himself in Florida in 1821. Two negroes had, in May 1811, in like manner, been loaned to Rutherford, who took them to North Carolina, where they were sold for his debts. In 1823, when the testator's two youngest children came of the age of 18 years, a division was made, when it was found that each heir was entitled to \$1274 25 cents; and the money loaned by Dismukes to Underwood having never been paid, he kept the negroes that Underwood placed in his possession in 1818, in discharge of the debt. In this settlement, the complainants being infants, were not represented, nor were they present on the occasion.

On the 5th of January, 1835, they filed their bill in the Chancery Court at Gallatin, against the executors of their grandfather, Thomas Royster, claiming, under his will, to be entitled to one-sixth part of his estate, upon the ground that the legacies to the children of the testator did not vest till the two youngest children arrived at the age of 18

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years. And that as both their mother and Mrs. Rutherford had died before that period, the property had consequently never been reduced into possession by their husbands, and ought to have been assigned to them, the complainants, on the final division in 1823, as "heirs" of their mother and deceased aunt. The only question, therefore, which was debated in this court was, whether the legacies were vested or contingent, according to the will of Thomas Royster.

His Honor, Chancellor BRAMLITT, who heard this case at October Term, 1838, being of opinion that "the personal estate of Thomas Royster did not vest in his children and their heirs until his two youngest arrived at the age of eighteen years or marriage," decreed an account of it, with special directions. From this decree the defendants appealed in error.

Dec. 27, 28.

GUILD & COOK for the complainant, said—The time of payment of the legacy in this case was the time when the legacy was to vest, and Mrs. Underwood having died, previous to the happening of the contingency on which the payment was to be made, the legacy did not vest in her. That legacy by virtue of the will vests in her heirs, the complainants, after the time of payment arrives. 2 Williams on Ex. 767-75; *Hanson v Graham*, 6 Ves. 239; 1 Roper on legacies, 383; 4 Ves. 399; 3 Ves. 363, 120, 75; 1 Roper 386, 392, 263; 2 Williams on Executors, 791; 9 Ves. 231; 1 Burrow 227; *Sansberry v. Read*, 12 Ves. 75.

If legacies are given at 21, or if, in case of, when, or provided, the legatees attain 21, or any other future definite period, these expressions annex the time to the substance of the legacy; and make the legatee's right to depend on his being alive at the time fixed for its payment. 2 Williams Ex. 766.

The words, after, or *so soon*, in this will, have the identical qualified meaning and operation as the words, at, if, when, provided, &c. and are a condition precedent to the gift.

In the case of *Hanson v. Graham*, it was determined that the words, at 21, if, when, &c., would be controlled by the testator giving, in the mean time, the whole interest, arising from the fund to the legatee, on the ground that the provision afforded a presumption that the testator intended the legacy to

vest before it became due. Yet it is there determined that if the gift of maintenance or interest, be not co-extensive with the whole amount of interest, the legacy will not vest prior to the arrival of the period at which it is to be paid. By this will, part of the interest or profits were to be applied by the executors to the support of the family, and the balance to be laid out and vested in property for the benefit, as he calls it, of his estate. 6 Ves. 239; 2 Williams Ex. 774.

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In the foregoing cases the *corpus* of the property was given, with a postponement of payment. In the case under consideration, there is no previous gift of the property, merely a disposal of part of the property—and then he directs—“So soon as my youngest children arrive at the age of eighteen years, or marriage, a division of my estate to be made amongst all my children and their heirs equally as the nature of the case will admit of.” The gift and payment in this case is one and the same thing. The time appointed for the division of the property or its payment is the very essence of the gift of it. Therefore, the legacy did not vest in Mrs. Underwood. 1 Roper 497, 500; 3d Ves. 363.

WHITE for the defendants said—The question here, under the third clause of the will of Thomas Royster, is, whether the bequest contained in it became vested in the children upon the death of the testator, if so this bill cannot be sustained by complainants as the heirs at law of Underwood and wife. It is a rule in the construction of a will that it must be so construed that the whole may be effectual and consistent. And that *that* construction is most favoured which will prevent a failure of the bequest. And again, that the words of a will must be taken according to their natural import unless some obvious inconvenience or incongruity will result. And that the construction must be made on the whole will taken together and must be such as to carry into effect the intention of the testator. 4 Comyns Dig. 193 and the authorities there referred to. With these principles in view let us examine the will.

The testator in the first clause of the will directs his lands to be sold by his executors, and that the proceeds of the sale together with his money and the outstanding debts due him be

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laid out in the purchase of another tract of land, and a deed taken for the same to all his children and their heirs. Here then is a present vested interest in the land to be purchased with the large fund set apart for that purpose. A man's land is always regarded with more concern than his personal property. And when we see the disposition made by the testator of this fund it furnishes a strong evidence that he did not intend to create an uncertain and contingent interest in the balance of his estate which he gives to his children.

The second clause gives the executors the power to sell any part of his perishable estate which they may deem expedient. But this is all in keeping with the balance of the will. It is evidently subservient to the main design that his children shall have the benefit of the whole of his property, but in a way that he considers will be most for their interest.

We come now to the third clause. And I will observe that the testator in making a will is always supposed *inops consilii*, and therefore a liberal construction is placed upon it in order to effectuate the intent. After the whole of his children shall arrive to manhood, or so soon as his two youngest children arrive to the age of 18 years or marry, then he says: "I direct a division of my estate to be made amongst all my children and their heirs as equally as the nature of the case may admit of &c." "Then I direct a division of my estate." Is it not palpable from these words that he intended his children to have absolutely his property, although for satisfactory reasons he thought proper to postpone the division. And we see what these reasons were, for they are stated in the first part of this clause. He considered no doubt that his family could be better supported and his children educated out of the profits by its being kept together than if it were then divided. His sons are to be put to a trade which of course would render it improper that they should at once be put into possession of their property.

Suppose the testator had directed his property *forthwith to be divided*, then there would be no question about its being a vested interest. These words *ex vi termini* in reference to property import a gift. The idea is precisely the same if it is *to be divided at a future day*, the time of enjoyment is only

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then postponed. These words in reference to property are as strong and as clearly indicate the intention to create a vested interest as *payable* or *to be paid to* in reference to pecuniary legacies, which according to all the decisions will have that effect. 2 Williams 766; 1 Roper on Legacies 378. The presumption of law is that the testator intended it to vest immediately and a contrary intent must be clearly indicated before the Court will place that construction upon it. 2 Williams 769; 1 Roper 377. It is altogether an unnatural construction to suppose when he is making his children the sole objects of his bounty, that he did not intend them to have his property absolutely and at all events.

The same idea is carried out in the next clause, showing that all the property is absolutely for his children. Such of them as marry are to have a portion of the property at once. Keeping a sufficiency for the younger children, for whom the executors are guardians. They are, to be sure, directed to bring it in at the division. But this is merely directory to them and in order that there may be a more just and equal division among all the children. A common sense view of the will, it seems to me, can lead to but one opinion about it.—That the testator intended at once to vest the property, and merely postponed the time of dividing it. A strong and irresistible argument in the law against the opposite construction is this:—It is certain the testator did not intend to die intestate, and yet, that is the inevitable consequence, “if the whole of his children shall not arrive to manhood, or if his two youngest children shall not arrive to the age of 18 or marriage.” It would then become a lapsed legacy and this whole bequest would fail; 2 Salkeld 415; 2 Williams 770. It will be clearly seen by reference to the authorities that in a will like this, time cannot be regarded as annexed to the substance of the gift; 2 Williams, 767–8, 770–3; Fearne on Remainders, note 553; 1 Roper, 382-3-6-7-8, particularly *Booth v. Booth*, 4 Vesey 400; 1 John. Chan. 497–8; 2 Dev. & Bat. 589-91-6-7-8.

From looking into the authorities it will be seen, there is no stern, inflexible rule of the law which is applicable to all cir-

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cumstances and all cases. And there are exceptions to all the rules which have been adopted. The object of them all being to carry into effect the will of the testator. See *Earl v. Grim*; 1 John. Chan. 497-8.

If our construction is right it was then a vested interest in the wife of Underwood, to which her husband and his representatives would be entitled. And must pass through a course of legal administration: Clancey 4-11-12; 6 John. 112, 117, 118; 1 Yer. 40-1, 51-2-3; 4 Yer. 10, 14.

The words "and their heirs" in the 3rd clause of the will, it is evident are words of limitation, and that the children of these legatees, can take only through succession to their parents, and not by way of substitution. The same words are used in the first clause of the will, and it is presumed, therefore, with the same meaning. See 2 Dev. & Bat. 597, where that construction is placed on the same words.

F. B. Fogg, on the same side, cited *Perry vs. Rhodes*, 2 Murphy, 140; *Doe vs. Prigg*, 8 Barn. & Al. 231; *Doe vs. Jesson*, 2 Bligh, 1; 6 Mumford's Reports, 156; 1 Hill's S. C. Reports, 358; *Orford vs. Churchill*, 3 Ves. & Beames, 59; 1 Jacob's & Walker, 388, note 2; Haye's Elementary Essay on the Construction of Limitations to Heirs, &c. A devise to children, son's, &c. differs in nothing from a designation of individuals by name, except that a devise to several *nominatim* as tenants in common fails as to the shares of those dying before the testator. Roper on Legacies, 46. When a testator is clothed with the character of a parent, it being his duty to provide for his children at his death, a court of equity presumes that he intended to do so by his testament. *Holloway vs. Holloway*, 5 Ves. 403; *Butler vs. Ommaney*, 4 Russell, 70, 3 Con. Eng. Ch. R. 572; 1 Randolph, 319; 4 Henning & Mumford, 411.

REESE, J. delivered the opinion of the court.

January 3.

The rights of the complainants to maintain this bill, under the circumstances which have occurred, depends upon such a construction being given to the will of their grandfather, Thomas Royster, as shall establish, 1. That the bequests of the will did not, upon the death of the testator, vest a

personal interest in the children of the testator to the property mentioned in the third clause of the will, but that the same was *contingent* upon the arrival of the younger children to the age of eighteen years, or upon their marriage. And 2. In the event which has happened, of the death of one of them, the mother of the complainants, before the arrival of that period, that the complainants, upon the arrival of the period referred to, are entitled to claim a division of the property, under and by virtue of the will, as being substituted to their deceased parent, by force of the term "heirs," in the direction which is given, that an equal division should take place among all the children, and their "heirs."

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1. Was the interest vested or contingent? This, of course, depends upon the intention of the testator, to be collected from the entire instrument. Whatever rules of construction courts of justice may have adopted in questions of this sort, are to be considered as guides in exploring doubtful intention. There is no rule of property, no principle of public policy, to exert a controlling influence. If the purpose of the testator was, to annex time to the gift, so as to make it essential to the gift, then the interest is contingent. But if his purpose was merely to postpone the division and distribution of his property to the time indicated, intending it, at all events, to belong to his children, then the interest was vested.

That the latter was the intention of the testator, we think manifest from several considerations. And first, the whole estate, real and personal, was to be enjoyed by all his children, as a class. They were the exclusive objects of his bounty, and equally the objects of his bounty. Not a cent is given to any other person; nor is there any limitation over in favor of children or other person. The entire *corpus* of his estate, and all the intermediate profits were to belong to, and to be enjoyed by his children and his wife, the interest with the latter, determining with her life. Perhaps no case can be found, marked by this equal and exclusive bounty to children, and where the bequest embraces the whole estate, in which it has been insisted, that the gift itself was contingent, merely upon the ground that the formal words of dona-

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tion were connected with those which indicated the time of enjoyment.

The cases upon this subject, which constitute a somewhat vexed branch of legal learning, have been mostly those where legacies, bearing no large proportion to the *corpus* of the estate, have been given to persons other than the heir at law, or those entitled to the residue under the will. There are some general principles stated, and well stated, by an able judge, in the recent case of *Vanhook vs. Vanhook*, 1 Dev. and Bat. 589, which strengthens the view of the case which we are now taking. "The law," he says, "leans in favor of the vesting of legacies, because the convenience of the legatees, and the interests of society are opposed to the tying up of property, and keeping it out of the commerce of life. It favors the vesting of legacies, more especially when given to children, or those standing in a like relation to the testator, because it presumes that testators naturally desire that the families of legatees, who die before the time for actual receipt of the legacy, shall succeed to the provision made for their parents. And it also favors the vesting of legacies, because, it will not intend that the testator meant to die partially intestate."

2. We think the interest in this case a vested one, because there is no doubt that the land, directed by the first clause of the will to be purchased by the proceeds of the Virginia land, the cash on hand, and the outstanding debts, was, by the very terms of the devise, vested in all the children. What reason could exist why the testator should direct a sale of his land, and that the proceeds, cash on hand, and debts, should be vested in other lands, and should be absolutely and at once given to his children, while their interest in his negroes and other property was to be contingent? And besides, it appears from other parts of the will, that the power and control of the executors, and testamentary guardians over this real estate, directed to be purchased, were to be co-extensive with that over the balance of the property, and the division, which they are directed to make among the children and their heirs, embraces as well that real estate, as the rest of the property.

3. Again, those clauses of the will which appropriate the profits of the estate to the education of the children, and the support of the family; which direct the surplus of these profits to accumulate for the benefit of the estate, and of those to whom it is ultimately to be paid over, and which empower the executors to place a portion of the *corpus*, or principal of the estate, in the hands of certain of the children upon loan, subject to be brought into contribution or collection, in the ultimate division of the real and personal property, involve in their effect and operation, and are evidence of a present gift of the body of the estate to the children of the testator.

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It is well settled with regard to pecuniary legacies, that however in point of terms and form, the gift itself, and the time of payment may be annexed; still, if interest upon the legacy is, in the mean time, given to the legatee, the legacy itself is vested. In this case, all the children and heirs at law of the testator constitute, as it were, one legatee; and the entire profits of the estate are to be enjoyed, or to accumulate for the benefit of this legatee. The legacy itself, therefore, by the authorities applicable to these circumstances, will be held to vest.

4. Again, The case of *Booth vs. Booth*, 4 Ves. 404, establishes, that where a bequest is of a residue, and the words are such as, in case of a legacy merely, would have made the legacy contingent, the bequest of the residue shall not be so held; and upon this distinction, that it is difficult to suppose that the testator meant to die intestate as to the residue. The distinction adopted by this authority applies with more force to the facts of the case before us, than to those of the case in which it was taken.

2. But if the legacies in the present case, were contingent, still the complainants, in the event which has happened, could not maintain their suit. The word "heirs" is used three several times in the will, and in each instance, as a term of limitation. There is, clearly, nothing in the will to control the obvious and legal meaning of the term, so as to embrace grand children, and substitute them as purchasers under the will. It is unnecessary, however, to dwell upon this point,

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or to sustain the opinion announced, by a reference to authorities, numerous though they be, upon this head of juridical discussion; for however clear the point may be, and we certainly deem it so, it is rendered unnecessary to a decision of the case, by the view taken of the first question.

The decree, therefore, will be reversed and the bills be dismissed, but without costs.

HARPER vs. LINDSEY.

CHANCERY. *Construction—Specific execution.* Agreements will be interpreted and specifically executed, according to the prevailing intent of the parties.

VENDOR AND VENDEE. *Contract—intent.* In a contract for the sale and purchase, at a gross sum, of a given number of acres, *off the west end of the vendor's tract, to come to a road, thence in the direction of a certain fence, to a specified point* the vendee will be entitled to the named quantity of acres, though not included between the west end of the tract, the road and the line, run thence to the point.

SAME. *Same. Vendee of residuo.* The construction of the contract will be the same towards a subsequent contractor for the residue of the tract, after the first vendee's purchase should be surveyed.

Isaac Lindsey sold to Robert Harper a parcel of land, and gave him a memorandum of the contract, of the following tenor:

“Received of Robert Harper one thousand dollars in full, for one hundred and twenty-seven and half acres of land, *off the west end of my tract, on which I now live*, adjoining the said Harper and John P. Wagner. ’Tis also understood that said Harper comes to the Madisonville road, and from thence with the direction of my cotton patch fence to the mouth of the gut on the river, this 17th October, 1834.”

Lindsey next sold the residue of the tract to James M. Gray, and the following memorandum of the agreement between them was executed under their hands and seals:

“Memorandum of an agreement this day made and entered into between James M. Gray and Isaac Lindsey, for a portion of land on Cumberland river, known as Lindsey’s land, part of the tract whereon he did live,—*all except the portion sold to Robert Harper.* The said Gray is to take *all the*

land after Harper's is surveyed, at eight dollars per acre, and to pay two hundred and fifty dollars next Christmas, and the balance in two equal annual payments thereafter: and the said Gray is to have possession of all the land and privileges thereon. In witness our hands this 28th day of February, 1835."

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It was found, upon making a survey, that to run to the Madisonville road, and from thence with the direction of the fence to the gut on the river, would not include $127\frac{1}{2}$ acres of land, but that there would be a deficiency of 25 or 30 acres. Harper insisted upon having his complement of acres "off the west end of the tract," according to the first clause in the memorandum. On the other hand, Lindsey thought that he was only bound to convey the land included within the boundaries specified in the second clause.

On the 23d of December, 1835, Lindsey tendered Harper a deed according to his construction, which Harper would not accept. And on the 29th of the same month, he filed his bill in the Chancery Court at Gallatin against Lindsey, to have a specific performance of the contract; and the matter of dispute between them, of course was, as to its true construction.

On the 22d of July, 1836, they entered into a written agreement of compromise, in which it was conceded by Lindsey that Harper should have the *quantity* of land claimed by him, and the mode of making the survey was prescribed, and persons were named by whom the survey should be made.—Lindsey failed to comply with this contract, and it was made the subject of a supplemental bill, filed by Harper on the 8th of September, 1836. On the 17th of October, 1836, Gray filed a cross bill to make himself a party to the litigation, in which he considered himself interested under his contract with Lindsey for the purchase of the residue; since, if Harper succeeded in obtaining $127\frac{1}{2}$ acres off the west end of the tract, he would include a spring, which was valuable, and formed an object in the purchase of the residue.

There was much parol testimony taken in the cause, but it would be impertinent to state it, because the case was decided upon the written contracts themselves without reference to any thing extrinsic.

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On the hearing before Chancellor BRAMLITT, at April Term, 1838, his Honor decreed that Lindsey should specifically execute the agreement between them by conveying Harper $127\frac{1}{2}$ acres of land, and he ordered a survey to ascertain the boundaries. And Harper was ordered to pay the costs of his own depositions. His Honor dismissed the cross bill with costs. From this decree Lindsey and Gray respectively appealed in error.

December 21. WHITE, for Harper, said,—Is it the true construction of Harper's contract that he is not entitled to any land east of the Madisonville road, the cotton patch fence and the mouth of the gut on the river?

Suppose the writing had stopped at the end of the first clause, would there have been any doubt or controversy about it? Harper is to get $127\frac{1}{2}$ acres of land for \$1000 off the west end of the tract. That is the important and controlling call, and what was evidently most had in view by the parties. Harper is authorised to go sufficiently far east to get the quantity of land, no matter how far it may carry him in that direction. There is no limitation in this clause of the writing.

Advert now to the latter clause, and see if the former is at all controlled or restrained by it:

"It is also understood," &c.: that is, something further, something additional to the main contract,—that the said Harper comes to the Madisonville road, &c. Under all circumstances he is compelled to come that far, and we see from the proof Harper was to pay for the overplus, if any. This is really a substantive and independent agreement, the price only is left out, but understood by the parties.

But, suppose, in coming to the Madisonville road, Harper does not get his $127\frac{1}{2}$ acres, is there any thing to restrain him from going beyond it? Not at all. The first clause is then left to operate in full force. Harper is to have his $127\frac{1}{2}$ acres of land, no matter how far east it may be necessary for him to go. These words are not used to indicate the ultimate eastern boundary. If that had been the object Lindsey would have said he received \$1000 for that part of the tract lying west of the boundary, without reference to quantity.—Lindsey, no doubt, supposed there would be $127\frac{1}{2}$ acres west

of the road, and more. But still, if he should turn out, in point of fact, to be mistaken, he does not intend to deprive Harper of his full quantity. And, therefore, no language is used to restrain him from going east of the road and fence, if necessary, for that purpose.

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Let us examine this with reference to some principles of acknowledged authority. In the first place, it is a rule with regard to deeds, (and it is giving them greatly the advantage in the argument to compare this loose memorandum with a deed,) that the intention of the parties must be carried into effect, if possible, unless it stands opposed to some established rule of law. Again, in construing an instrument, the whole of it must be taken together; and such a construction must be placed upon it as to give effect to the whole instrument, so that every part of it, and every word, may operate if possible. And again, a deed must be construed most strongly against the grantor, and every exception in the deed, and every uncertainty, are to be taken favorably for the grantee. 3 Hay. 243; 1 John's Cases, 402; 3 Johns. 395; 16 Johnson, 178-9; 4 Cruise Dig. Tit. 32, c 23; Shep. Touch. 82-3; Cowper 600; 8 Johnson, 406; Coke Litt. 183 a.; 9 East. 15; 3 John. 387.

With regard to the intention, is it not clear that Harper is to get, at all events, 127½ acres of land, no matter how far east it might carry him? And that the second clause, so far from restraining him to any particular boundary, was intended merely to compel him to go to a particular point, even if it should exceed the quantity? This is wholly different from the class of cases arising upon deeds where the boundary is ascertained, calling for natural or artificial objects. Then you must go to those objects disregarding course, and distance, and quantity. *This* is an executory contract, and it is palpable it never was intended to be a precise ascertainment of boundary.

Upon the construction which I contend for, every part of the instrument can have its effect. Harper gets his 127½ acres. He comes to these different points. He goes beyond them to be sure, but there is no language used which prevents him from so doing. But, suppose it is uncertain from the

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instrument (and that is the most it can plausibly be contended for,) whether Harper is to go east of these boundaries, then the principle is, that this is to operate in favor of the grantee. Here, in the first place, 127½ acres is to be conveyed, without any limitation of boundary. The second clause, if it operate as argued for, is in the nature of an exception to the general clause; and it must appear then clearly, that the land east of this boundary is excepted, which it does not.

December 26.

WASHINGTON, for Lindsey and Gray, said—The only question arising in this case, is, as to the construction of Harper's contract; for whatever that may be, Gray is certainly entitled to the whole of the residue of the land.

1. The written contract must speak for itself, and be interpreted by its own terms, without reference to any thing but what is contained upon its face. 1 Johnson's Ch. Rep. 282; 14 Johnson, 32-33; 3 Starkie on Ev. 995, *et seq.*

2. The specification of any thing in a contract, is an exclusion of things not specified. 1 Johnson's Chan. Rep. 183.

3. The call for natural or artificial objects in a contract, will control the call for quantity.

4th. The construction of this contract insisted upon by Harper, is most unreasonable; inasmuch as it does not admit of loss on his part, and by possibility, might subject Lindsey to great loss. There is no mutuality in Harper's construction of the contract.

5. There has been no practical interpretation of the contract, by the parties themselves, confirming Harper's opinion of it.

January 4.

TURLEY, J., delivered the opinion of the court.

This is a bill for the specific performance of the following written contract: "Received of Robert Harper, one thousand dollars in full, for one hundred and twenty seven and a half acres of land, off the west end of my tract, on which I now live, adjoining the said Harper and Jno. P. Wagner;—it is also understood, that said Harper comes to the Madisonville road, and from thence with the direction of my cotton patch fence, to the mouth of the gut on the river."

Now it is contended, that this is a contract to purchase

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land by *metes and bounds*, and that the complainant is entitled to no land, east of the Madisonville road; though he loses, by this construction of his contract, thirty or forty acres of the quantity bought and paid for by him. Is this the legal construction of the contract? We think not. This contract is executory, and must receive such a construction as will accord with the intention of the parties at the time it was made. The intention was to sell and buy $127\frac{1}{2}$ acres of land, to be laid off, on the western end of the tract. This quantity was paid for. The second intent was, to make the Madisonville road and a line running from thence, in the direction of the cotton patch fence to the river, the eastern boundary, it being thought to be a convenient one, and to contain, at least, a sufficient quantity of land, to comply with the contract, perhaps more.

Here then are two intents in a contract, contradictory to each other, both of which cannot be enforced. If complainant receive the quantity of land purchased by him, the Madisonville road, and a line from thence to the river, cannot be made the eastern boundary. If the Madisonville road be made the eastern boundary, then the complainant loses thirty or forty acres of his land, and the consequent amount of his purchase money. Which interest must prevail? Both law and justice say the primary. It was not the intention of the complainant to buy, nor of defendant to sell, the land to be limited by a line from the Madisonville road to the river, unless that should equal $127\frac{1}{2}$ acres, the quantity paid for. But the intention was, that the complainant should make the Madisonville road his eastern boundary, although it might include more land than the $127\frac{1}{2}$ acres contracted for. Then, as between Harper and Lindsay, the complainant is entitled to have the lines of his land extended east of the Madisonville road, so as to give to him $127\frac{1}{2}$ acres, the quantity which he intended to purchase.

But it is further contended, for James M. Gray, who has become a party to this suit, by a cross bill, that after the contract between Harper and Lindsay, he became the purchaser of the remainder of the tract of land from Lindsay, and

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that Harper's line cannot be extended east of the Madisonville road, to his injury.

Gray stands in no more favorable attitude, in relation to Harper's right, than Lindsey. His purchase was made after Harper's, his contract is executory, and therefore, as Harper's contract was first in point of time, he is first in point of right. But, in truth, Gray only purchased the residue of the tract, after Harper's was surveyed. This, of itself, independently of the principle above laid down, would give Harper the right, as against him, to have his land laid off, according to the legal construction of his contract, he being only entitled to the residue, after Harper's claim had been satisfied.

We therefore think there is no error in the proceedings of the chancery court, and affirm the decree.

NOTE. The **RULE** of interpretation, of which this case is an example, is thus expressed in a late work, Lieber's Political and Legal Hermeneutics, §xiv 13. *The general and superior object cannot be defeated by a less general and inferior direction; and, in general, the higher prevails over the lower, the principal over the specific direction.* 18 American Jurist, 80.

The following remarks and authorities relate to the construction of *deeds* where the *metes and bounds* are regarded as the superior object, and the *quantity* as the inferior and less general direction.

In a conveyance of land by *deed*, in which the land is certainly bounded, it is very immaterial whether any, or what quantity, is expressed, for the description by boundaries is conclusive. And when the quantity is mentioned in addition to a description of the boundary, *without any covenant*, that the land contains that quantity, the whole must be considered as a mere description; for the quantity mentioned is an uncertain part of the description, and must yield to the location by certain boundaries, in case of a disagreement, whether the quantity mentioned is more or less than the quantity actually contained within the limits expressed. Per PARSONS, C. J., in *Powell vs. Clark*, 5 Massachusetts R. 355.—And see upon this subject, Sugden on Vendors and Purchasers, c 6, § 3, Am. Ed., where numerous American cases are collected upon this litigated point of law. *Hoffman vs. Johnson*, 1 Bland's Maryland Chy. R. 180; *Pringle vs. Samuel*, 1 Littell, 44; *Brown vs. Parish*, 2 Dana, 9; 8 Wheeler's American Common Law Cases, 286, 287.

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CHANCERY. *Debtor and Creditor—Assignment, what stipulation in will vitiate.*

If an assigning debtor make his note, at the time of the assignment, to the creditor, not to secure a debt then due, or advance then made; but in consideration of the creditor's verbal promise to allow him a further credit, to support his family, or carry on his business, and such note purport to be secured by the assignment amongst the real debts mentioned in it,—the deed will be set aside, at the suit of a judgment creditor of the assignor, as fraudulent and void in law.

SAME. *Same—Assignment annulled for constructive fraud, how assignee to account.*

If an assignment for the payment of debts embrace some effects which are liable to execution at law, and some that are not, and it be set aside for constructive fraud, at the suit of a judgment creditor of the assignor, the assignee will account—

To the judgment creditor—

1. For such effects, as existing in specie when the *f. fa.* was issued, would, in the absence of the deed of trust, have been subject to its lien.
2. For the proceeds of such effects.

To all the creditors parties in the suit—

3. For all effects in his hands not subject to execution, as choses in action, &c. And, having converted the debtors effects into cash, he will be allowed a credit for so much thereof as he had applied to the satisfaction of his own debt, if himself a creditor; or of any other *bona fide* debt paid by him as assignor, before the complainant's lien attached: as also for all reasonable charges and commissions for care, and sale of effects, and collections.

Ames v. Blunt, 5 Paige, 540; *Grover v. Wakeman*, 11 Wendell, 187, cited and approved. See *post* *Ewing v. Cantrell*.

William Turner, a hatter of Gallatin, became indebted for materials in his business and other merchandise, to J. R. A. Tompkins in about the sum of \$ 323 31 cents; to Patterson and Tompkins in the sum of 100 dollars; to Daniel McAuly in the sum of 146 dollars; to D. & A. McAuly in the sum of 629 dollars 14 cents; to B. & J. H. Peyton in the sum of 447 dollars; and to James Peacock of Nashville, for materials in his business exclusively, in the sum of 1072 dollars and 8 cents. On the 7th July, 1837, in order to secure the four first named debts, he conveyed in trust to Charles Lewis, by deed, his "frame shop as it stood on a lot of James L. McKoin's in South Gallatin, together with four kettles, one lead and three casts, then in said shop; all his stock of furs; all his finished and unfinished hats, hat trimmings and finishing tools of every description; all his notes due, and book accounts then due, or thereafter to fall due; all his household and kitchen furniture, consisting in part of one press, one bureau, one

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set tables, three beds, bedsteads and furniture, two sets Windsor chairs, and every article of furniture of house and kitchen that he possessed; also one horse and carryall and gear; and one writing desk and counter." The debts in question amounted to 1198 dollars 45 cents, and the property was estimated to be worth about 1600 dollars. To cover the deficiency, and probably to secure himself a further credit with J. R. A. Tompkins and D. & A. McAuly, Turner executed his two notes of the same date with the deed, one to Tompkins for 300 dollars, to be due on the 25th of December, 1837,—the other to McAulys for 200 dollars, to be due on the 1st of January, 1838. On the next day, in order to secure his debt to Peytons, he executed another deed to R. H. Lewis, conveying to him "one frame shop on a lot of James L. McKoin's in South Gallatin, together with four kettles, one lead and three casts then in said shop; all his stock of furs; all his finished and unfinished hats, hat trimmings, and all other materials in said shop, and his tools and furniture of every description appertaining to the same; together with all his notes, dues, obligations, and book accounts then due, or thereafter to fall due in the pursuit of his trade; also one horse, carryall and gear," in trust if there should be sufficient left after discharging the four debts secured by the deed to Charles Lewis, or in the event that deed should be vitiated or set aside, and Turner should not pay Peytons by the first of January, 1838, then the trustee was to sell the property to raise a fund to pay said demand, &c.

On the 20th of January, 1838, Turner appeared in the circuit court of Davidson and confessed judgment in favor of Peacock for the amount of his demand, 1072 dollars 8 cents. On this judgment a *fi. fa.* was sued out on the 28th of January, 1838, directed to the sheriff of Sumner which came to his hands on the 29th, and was returned the same day, *nulla bona*.

Thereupon, on the 3rd of February, 1838, Peacock filed his bill in the Chancery court at Gallatin against the parties to the first mentioned deed of trust, stating that Turner had been allowed to retain the possession of, and consume the property mentioned in the deed, which he charged to be therefore fraud-

ulent, and especially as to the note for 300 dollars to Tompkins, and the note for 200 dollars to McAulys, and praying that it might be so declared, and that the property therein mentioned might be subjected to the satisfaction of his demand, &c.

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The parties to the deed filed a joint answer. Lewis the trustee, disclaimed all knowledge of the facts and referred himself to the answer of his co-defendants. The other defendants stated that—"with regard to the books, notes and accounts of Turner, they had been, at once, delivered by Turner to the trustee, and handed over by him to J. R. A. Tompkins, who, by consent of all parties in interest, was to collect them and apply the money to the satisfaction of the debts specified in the deed. With regard to the rest of the property, it was likewise delivered over to the trustee. There was a considerable quantity of unfinished materials on hand for making hats, which would have been sacrificed, unless some one could have been got to attend to the business and finish the hats; and it was therefore agreed that Turner should continue in the shop, as agent for the defendants, until the 1st January, 1838, and finish the hats, on their account. He was likewise permitted, as agent of the defendants, to sell any of the hats in the shop, when he could do it to advantage, but never for his own individual use. He was to report his sales to Tompkins, who was to charge them on the books, and collect the money. He made sales, in this way, to the amount of 178 dollars 19 cents, a bill of which was rendered to Tompkins, and the notes taken for the purchase money placed in his hands, which would soon be collected. The horse and carryall were sold in like manner, reported to Tompkins, and the note delivered to him. Discovering that Turner had not always acted in good faith in reporting his sales, Tompkins took possession of the shop a few weeks after the execution of the deed.

With regard to the 300 dollar note executed by Turner to Tompkins, Tompkins admitted that Turner owed him, when the deed of trust was made, only 323 dollars 31 cents, and a small account and note, which were forgotten and not included in the deed. He stated that Turner himself was the first to propose to secure the payments of his demand.

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by executing the deed of trust, which he was the more solicitous to do, because a considerable part of the debt had been incurred for materials which he had bought for him in Philadelphia, and likewise for pay of his journeymen.—Turner stated that as he had just commenced business on his own footing, he had nothing which he could at the moment convert into money, except at great sacrifice; and that his notes and accounts for sales would not be due till January, 1838, at which time he believed he would be able to meet all his debts. Upon which considerations the time of the credit in the deed of trust was extended till that day. And Turner, further representing, that to carry on the business of the shop, to pay journeymen, and purchase necessary articles for himself and family until the day at which the credit was to expire, a considerable amount would be necessary, therefore proposed to execute the note in question, which was done, and it was inserted in the deed of trust: and it was intended to secure him, Tompkins, in whatever advances he should make Turner till the first of January, 1838; and, in point of fact no more than 25 dollars 22 cents was advanced upon it, because Turner's employment in the shop was brought to an end very soon after the date of the deed.

The McAulys, stated that when Turner was about to make the deed, he told them that he must have something to live upon for himself and family until the 1st of January, 1838, at which time the property was to be sold for the payment of the debts specified in the deed, unless otherwise discharged; that it would take perhaps 200 dollars or more for the support of his family, and that he would execute his note to them for that amount, to become due on the 1st of January, 1838, and that this note should likewise be secured in the deed; that it was done, and it was distinctly understood that Turner was to have the privilege of extending his account with them in their store to that amount; that they were reluctant to make this arrangement, but Turner told them if they refused, he would not include their debt in the deed, but would make it to those who would give him the credit; that, however, in consequence of Turner's soon after leaving, he had only taken up, on account of that note with them, 25 dollars 49 cents, and they

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had never pretended to claim more of that note than that amount. The defendant 'Tompkins denied that he had any knowledge, at the time, of the execution of the note to McAulys, and they make the same denial as to the execution of the note to him; and, therefore, they say whatever fraud Turner may have contemplated, there was no concert between the defendants upon the subject, and they denied intentional fraud in the most explicit terms.

Turner, in his answer, said that the 300 and 200 dollar notes were made without consideration; that there was nothing paid him for them, nor agreed to be paid him, either by taking of goods, or receiving further advances afterwards; that it was agreed at the time that he was not to pay them, and that the overplus in their hands after satisfying the other debts was to be paid to him; that the deed was made to cover the whole of his property by his executing those notes, the real debts being estimated at about 1100 dollars and the property at 1600; that while carrying on the business after the deed, he did apply some of the property mentioned in it to his own use, to wit: a bed, bedstead and furniture, one set of chairs, two looking glasses, some queen's ware, &c.

On the 27th of March, 1838, the Peytons filed their cross-bill in the cause against all the parties to the original bill, impeaching the deed of trust to Charles Lewis for the same reasons that Peacock had urged against it; and praying that it might be set aside, and his own set up and satisfied by a sale of the property, &c. This bill was answered; and the causes were brought to hearing on the 10th of October, 1838, before his Honor Chancellor BRAMLITT, on the pleadings and exhibits; and being of opinion that the notes of 300 and 200 dollars were colorable; that the first deed of trust was therefore void; he so declared, and decreed that Peacock and Peytons should have satisfaction of their demands, Peacock first, and Peytons afterwards, the deed of trust made to secure their debt not having been so proved and registered as to give it priority over Peacock's judgment; and he directed an account in which, J. R. A Tompkins was to be charged with the amount of Turner's available effects, or which might, by reasonable diligence, have been made available; and that he should have

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reasonable allowances for his attention to the business; that Tompkins and McAulys should pay their own costs, the residue of the costs to be paid out of the fund, and the balance divided between the creditors secured in the first deed *pro rata*. They appealed in error.

GUILD, for the complainant said, 1. The defendants procuring Tuner to execute the two notes, one for 200 dollars, and the other for 300 dollars, without consideration, payable to themselves, and placing said notes in the deed, the payment of which to be secured by the property conveyed, was fraudulent as against his other creditors; and the deed being void in part is void *in toto*. 14 John. 465; 20 John. 449; *Mackie vs. Cairns*, 5 Cow. 547.

The pretext set up by defendants in their answer, that they did not intend to enforce the collection of the notes, if Turner did not extend his account in their respective stores to the amount of these notes, and then only to the extent of his dealing with him, after the execution of the deed, cannot make the deed fair and *bona fide*. Turner was then indebted to insolvency. The notes were made to cover the whole of his property by this deed. The debts of defendant against him were not sufficient to do this, and keep off the rest of his creditors, and therefore he is made to acknowledge on the deed an indebtedness to the extent of \$500 more than his actual indebtedness, and his property conveyed to pay it. And the explanation set up in the answers, amounts to a verbal arrangement between defendants and Turner, by which defendants keep off the rest of the creditors of Turner from resorting to the surplus of his property conveyed, and permits him to use and consume that property. This is fraudulent, one of the very strongest badges of fraud, being the creation and existence of secret trusts between the vendor and vendee. *Twyne's case*.

The property of a debtor who fails belongs, in moral justice, to his creditors. Per Savage, Chief Justice, in *Mackie vs. Cairns*, 4 Cow. 547. An insolvent debtor may pay some creditors in preference to others, and may secure his preferred creditors by assignment in trust for such creditors; but he can make no assignment of any part

of his property for himself; and if the security contain any such provision, it is void, not only for the portion reserved, but for the whole, not only in equity but at law.

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If the provision for the support of Turner's family had been placed in the deed, it would have rendered the whole deed void. Is it not a much stronger case of fraud, if the defendant accompanies the deed covering his whole property, with a secret agreement, that he should use and consume to the extent of \$ 500 of his property? Would not such a deed delay and hinder his creditors in the collection of their debts, within the meaning of the statute of 1801, c 26, § 2; and the decisions on that subject. 3 Yer. 503; 2 Wend. 596.

If a judgment is taken for a larger amount than is actually due, for the purpose of defeating another creditor, the plaintiff is liable to the penalty given by the statutes. *Wilder vs. Fondey*, 4 Wend. 100.

Fraud will be inferred, if a debtor in failing circumstances embrace more property in the assignment than sufficient to pay the debt. *Beck vs. Burdett*, 1 Paige, 309. The distinction between the jurisdiction of fraud at law, and in equity is, that in the former court it must be proved and is not to be presumed, whereas in the latter it may be presumed. *Gallatian vs. Cunningham*, 8 Cow. 361.

The admission of facts in an answer, from which fraud may be inferred, is sufficient to set aside the deed, although the defendant shall, in his answer, deny any intent to defraud. *Grover vs. Wakeman*, 11 Wend. 187.

2. The possession of the property conveyed by Turner, his use and consumption of part, renders the deed fraudulent and void.

A mortgage of personal property, as well as the absolute conveyance of such property, is *prima facie* fraudulent and void, as against creditors and *bona fide* purchasers, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession. But a continuance of possession by a vendor or mortgagor may be explained; but his accommodation will not present a sufficient explanation. *Gardner vs. Adams*, 12 Wend. 297.

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The record shows, that Turner was to continue in the possession and consumption of this property, as he did, which of itself renders the deed void.

Creditors cannot be permitted to secure their honest debts on their debtors property, and at the same time to cover his remaining all from every other creditor, with an intent to let the debtor use and exhaust his means of payment, reserving the object secretly to be applied to the mortgagee's debt. Hence it is that the courts have so strongly set against those sweeping deeds. *Darwin vs. Handley*, 3 Yer. 503.

3. The complainant had a right to come into chancery for relief, so soon as he had obtained his lien, by taking out his execution. He can resort to a court of equity to subject the equity of a debtor, to the satisfaction of his debt. Case of real estate. *Shirley vs. Watts*, 3 Atk. 200.

When property is subject to an execution, and a fraudulent obstruction is interposed to prevent the sale, a creditor may file his bill to remove the obstruction so soon as he has obtained a specific lien upon property, by the issuing his execution. It is not necessary that it should be returned. *Beck vs. Burdett*, 1 Paige, 305.

If the creditor does not seek to remove a fraudulent obstruction, but to reach an outstanding equity, the execution should be returned. 1 Paige, 305.

Complainant in this case brings himself within either of those distinctions, as his execution was issued and returned by the sheriff, *nulla bona*.

The power of the circuit court to issue the execution previous to adjournment of the term, is a power inherent in the court, and is conformable to practice in this state.

If the execution was irregularly issued, it might be a ground for the defendant in the execution to quash it by motion. It cannot, however, be disputed by third persons, and in a different court.

4. Judgment obtained against a non-resident on a bond is *prima facie* evidence that the consideration is paid, it is not conclusive, but enough to throw the burden of proof on those who dispute it. 8 Yer. 44.

5. There is no error in the decree below, declaring the

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deed of the 7th July fraudulent in fact, and decreeing that defendant, J. R. A Tompkins, shall account for the property, and its proceeds in his hands, and pay it over to the judgment creditor, James Peacock. A deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or unequitable circumstances, or which is only constructively fraudulent. *Boyd vs. Dunlap*, Johns. c. 487; 8 Ves. 263; *Sands vs. Codwise*, 4 Johns. 536, 598, 99.

WHITE, for the defendants, said, this case stands alone upon the pleadings in the cause, no proof having been taken upon either side. Tompkins, McAuley and the Pattersons are not to be prejudiced by the answer of their co-defendant, Turner, because it is a rule in equity that the answer of one co-defendant is not evidence against another. Even the deposition of a joint defendant cannot be taken without an express order from the master.

To enable the complainant to come into this court, he must first show that he has exhausted his legal remedies. That an execution has been issued upon his judgment at law, which has been returned no property found. *Angell vs. Draper*, 1 Ver. 398-9; *Shirley vs. Walls*, 3 Atk. 200; 2 Johns. Ch. 296-7, *Hendrick vs. Robinson & Son*; 3 Yer. 81-2, *Cloud vs. Hamilton & Sittler*.

These facts are stated by complainant in his bill, but are denied in the answer, and the point relied upon as a defence. The execution which is shown in the record from the circuit court of Davidson, issued during the sitting of the same court in which the judgment was rendered, and was forthwith returned during the same term. This was not warranted by the law, or the rules of the court, and the execution was irregular and void.

2. Complainant's bill cannot be sustained upon another ground. Even if the deed of trust was fraudulent, which it is not, it cannot be attacked by a judgment which is confessed without proof that it is a just debt. *Roberts on Frau. Con.* 489-90. Turner's indebtedness to complainant is denied in the answer, and complainant is called upon for proof.

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3. Of the fraud charged in the bill, there is an express and unequivocal denial in the answer. The answer, which is responsive to the bill, must be taken as true; and it shows clearly that no fraud in point of fact, no actual or intentional fraud was committed. Is it then fraudulent by construction and in point of law?

Did the arrangement between Turner and Tompkins and the McAulys render the whole deed fraudulent and void? This is wholly different from the cases in 3 Yer. 503; 4 Yer. 547; 6 Yer. 140, 419. They merely show that you cannot include perishable property in the deed, which must necessarily be consumed in the use, and let the grantor remain in possession.

This arrangement could not possibly make the whole deed fraudulent, because the effect of it would not be to enable the debtor to use and consume the property as his own. It would give him no control over that. It would merely secure an honest debt, which it was agreed might be created. It could not delay creditors, because the introduction of these notes in the trust did not extend the time when the property was to be sold.

As a decisive test in regard to the question of fraud, suppose McAuly had advanced the whole \$200 in goods, and Tompkins the \$300 in paying journeymen, and in furnishing the materials for sale, could there then have been any possible ground for the charge of fraud? Certainly not. The only contest then that could have taken place with other creditors, would have been in regard to the validity of these last debts, and whether the payment of these two notes should not be postponed if there was a deficiency to pay other creditors. Can a failure in the consideration of these notes vitiate the instrument, because McAuly advanced in goods but twenty-five dollars, instead of two hundred dollars, and it became necessary for Tompkins to make only small advances, which were otherwise principally paid.

If the deed was originally fair and *bona fide*, no matter *ex post facto* could make it fraudulent and void.

The authorities show that a deed may be made to secure future advances as well as existing claims; and that a sum may

be reserved in the deed for the maintenance of the grantor, and that it will not invalidate the instrument. 15 John. 573, 582-9, *Murray vs. Riggs*; 2 John. Ch. 305, 308, 309, *Hendricks vs. Robinson*; 3 Cranch, 73, 89; 2 John. Chan. 565, 680; 20 John. 557; 2 Ver. 510-5; 5 Term Rep. 420.

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It is said, however, that this fact ought to appear upon the face of the deed; the answer is, there is no law which requires the consideration of the notes to be stated in the deed. And again, it is not necessary to the validity of the deed that it should truly state the debt intended to be secured; but if the real transaction is somewhat variant from that which is described in the deed it shall still stand as security, for the real equitable claims of those claiming under it. *Shirras & others vs. Craig & Mitchell*, 7 Cranch, 36, 50-1.

It is a principle of a court of equity, that when a man asks for equity he must be willing to do it. And when the complainant asks to be let in upon the trust fund, he must first allow the true amount of the debt secured by the prior lien. Further than this defendants do not now, nor have they ever claimed the property.

To make a sale void against creditors, the vendee must participate therein. 9 Yer. 325. The same principle will equally apply to the grantee or bargainee, under a deed of trust. The defendants in their answer say, that the arrangement in regard to the \$300 note made between Turner and Tompkins, was not known to the McAulys, nor was the arrangement between Turner and the McAulys in regard to the \$200 note known to Tompkins, and whether Turner had any intention of committing a fraud upon the creditors, they are unable to say. If he had any such intention they did not know it, it was not communicated to them.

Where a deed is sought to be set aside, as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it, but there are suspicious circumstances as to the adequacy of the consideration and fairness of the transaction, the court will not set aside the conveyance altogether, but will permit it to stand as security for the sum actually paid. 1 John. Chan. 473, 482, *Boyd & Suydam vs. Dunlap & others*.

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In the case of *Grover vs. Wakeman*, 11 Wend. 190, the decree of the chancellor, which was affirmed, allowed the creditors the amount of the fund, which, before the filing of complainant's bill, was in their hands, and this decree of the chancellor was affirmed. In the case before the court the whole fund was in the hands of the creditors before filing of complainant's bill. See 5 Paige, 13, *Ames vs. Blunt*, sustaining the same principle. Upon this ground likewise, the decree of the chancellor ought to be reversed, and the defendants allowed to participate in the fund.

January 4.

REESE, J. delivered the opinion of the court.

The main question arising upon the bill and answers, is, whether the deed of trust, by virtue of which Tompkins and others claim to be entitled to the property and effects assigned to them, for satisfaction of their debts, be fraudulent in fact, or by operation of law as against the complainant, a creditor of the assigning debtor, Turner?

In the deed of trust, there is specified a bill single of the amount of \$300, as due to Tompkins, and another of \$200 as due to McAuly, which, it is admitted in the answers, were executed at the time of making the assignment, not to secure any debt then due, or any advances then made, but upon a verbal agreement and understanding between the parties, that credit should be given to the debtor, and advances made for the joint object of enabling him to support his family, and to manufacture the materials assigned for the benefit of the assignor and assignees. Was this fraudulent in fact or by operation of law, as being calculated to embarrass and postpone other creditors in the collection of their debts?

It is said, in argument, on behalf of the assignees, and authorities are cited to prove, that it is not a circumstance vitiating a deed of assignment, if it stipulate for future advances. Without deeming it necessary to assent to, or to repudiate this proposition, it is sufficient to remark that such is not the stipulation in the deed, upon this record. It announces to other creditors, an existing debt of \$500, which did not in fact exist, and for which there was no consideration, other than the secret agreement between the parties, which is

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stated in the answers. If this may be done, and the deed remain a valid security for the debt really due, is it not obvious that it would furnish to fraudulent and embarrassed debtors, and their friendly assignees, a mode of protecting property against the executions of other creditors, as simple and easy as it would be safe? A small amount of actual indebtedness, to serve as a *nucleus*, might, in this manner, be enlarged to such magnitude as to cover considerable property, and so as to alarm and repel other creditors; and, depriving them of the legal remedies, constrain them to seek discovery and relief, and investigate the question of indebtedness and its extent, in a court of chancery. Perceiving from the pleadings no ground upon which to charge the parties to this deed of trust, with intentional fraud, or fraud in fact, we entertain no doubt that, for the reasons stated, the deed is fraudulent by operation of law, and must be set aside as void, and as constituting no valid security for the debt mentioned in it.

As resulting from this opinion, it is clear that, as against the assignees in the deed mentioned, the complainant in the original bill has a right to claim and receive such effects, or the proceeds of such effects, as existing in specie at the time of the issuance of complainant's *scire facias*, would, in the absence of the deed of trust, have been subjected to the operation of its lien: after deducting all reasonable charges and commissions for taking care of said effects, or for the sale of them and the collection of the proceeds.

2. By filing his bill in the present case, the complainant has obtained an equitable lien, which enables him to claim an account of the funds of his debtor in the hands of defendant, Tompkins, beyond the amount of the proceeds of the effects above referred to, as subjected to the lien of the execution.

But in taking this account, we are of opinion that the funds in the hands of Tompkins, at the time of filing this bill, other than those subjected to the lien of the execution mentioned, may be retained by Tompkins to the extent of his *bona fide* debts. This is sanctioned, we think, by the principle determined in the case of *Ames v. Blunt*, 5 Paige, and the case of *Grover v. Wakeman*, 11 Wendell, 187. These were cases, indeed, where the funds were in the hands of assignees who

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were not creditors; but we apprehend the principle will apply to the present case.

In the first named case, the Chancellor, upon this point, says: "I apprehend that the liability of the assignees, for the proceeds of the assigned property, which have been distributed to the *bona fide* creditors under the assignment, must depend upon the question whether the legal or equitable rights of the complainants have been impaired or affected by such distribution. In other words, whether they have in fact been defrauded thereby. The principle, then, upon which the decision of this court in *Wakeman v. Grover*, and of the Vice Chancellor in the present case is sustainable, is, that the proceeds of the assigned property had been distributed, according to the directions of the assignors, in payment of *bona fide* creditors, to whom such proceeds might have been lawfully distributed by the assignors themselves at any time before the complainant had obtained any legal or equitable lien thereon; and, therefore, that the complainants have not been defrauded or injured by such distribution. But, if the assigned property, or the proceeds thereof, had remained in the hands of the assignees, undistributed, at the time of filing the bill, which would have given to the complainants a lien thereon as the property of their debtor, the assignment being voidable by them at that time, it would be a fraud upon their rights to distribute the proceeds afterwards."

If, therefore, before the filing of the bill, Tompkins had received his *bona fide* debt, it was, as if paid to him by the assignor, and would not be in fraud of the legal or equitable lien of complainants; and if, as assignee, he paid over in satisfaction of *bona fide* debts to the other parties, money of the debtor in his hands, before complainant's legal or equitable lien attached, the payment will be good. But if money of the debtor over the amount of his *bona fide* debt, were in his hands at the filing of the bill, he must account for it in this case.

But as to the money arising from effects and sources upon which the complainant's *fieri facias* created no lien, and which cannot be retained upon the principle last above stated, all the parties, creditors, before the court, in the present bill,

will be entitled *pro rata*. As to the accounts and choses in action which remain uncollected, the same principle will be applied. Peacock
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The question of priority as between the complainant in the original bill, and the complainants in the bill in the nature of a cross-bill, will be reserved till the coming in of the report.

THE STATE vs. CLAIBORNE.

CONSTITUTIONAL LAW. *Who is a citizen—Const. U. S. Art. 4, § 2.* Free blacks are not citizens within the meaning of the provisions of the Constitution of the United States, Art. 4, § 2, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

SAME. *State Statute.* A State statute making it unlawful "for any free person of color to remove himself to the State to reside therein, and remain therein 20 days," does not violate this provision of the Constitution of the United States: *Amy v. Smith*, 1 Littell, 326.

SAME. *Who is a freeman—Const. of Tenn., Art. 1, § 8.* Nor does such a statute violate the Constitution of Tennessee, Art. 1, § 8, "providing that "no free man shall be taken," &c., for by freeman, is here meant one who is entitled to all the privileges and immunities of the most favored class; and if it meant more, the provision only applies to those who are already citizens of the States; and consequently would not prevent the States from passing laws prohibiting a given class of persons from becoming citizens.

The grand jury of Maury county indicted the defendant on the 8th of January, 1838, upon the act of 1831, c 102, for this, that being a free person of color, emancipated agreeably to the laws, now and heretofore in force and use in the State of Kentucky, one of the United States, he did, after the passing of the act of 1831, feloniously and unlawfully remove himself to this State, to wit, to the county of Maury, to reside therein, and did remain therein 20 days, and still feloniously doth reside in the county of Maury, contrary, &c.

And for this, that being such free person of color, emancipated as aforesaid, the defendant did, on the 1st of January, 1834, feloniously remove himself to this State, to wit, in the county of Maury, to reside therein, and there feloniously did remain 20 days, and more, to wit, from, &c. to &c., and during all the time aforesaid, hath, and still doth, feloniously re-

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main therein, &c.; and during all the time aforesaid, feloniously bath presumed and attempted to reside therein, &c.

The defendant demurred to this indictment. The court, DILLAHUNTY Judge, sustained the demurrer, discharged the defendant, and ordered the county to pay the costs; whereupon the Attorney General, THOMAS, prayed an appeal in the nature of a writ of error to this court, and the defendant entered into a recognizance to appear, &c.*

The act of 1831 creates this offence in the following words:

"It shall not be lawful for any free person of color, (whether he be born free, or emancipated agreeably to the laws in force and use, either now, or at any other time, in any State, within the United States, or elsewhere,) to remove himself to this State to reside therein, and remain therein twenty days."

The ATTORNEY GENERAL said, that the question presented by this demurrer is—whether this Act of Assembly is in conflict with the Constitution of the United States, art. 4, § 2, that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." 3 Story's Comm. Const. §1799, 1800.

Any sovereign State, i. e. one "which governs itself independently of foreign powers"—Wheaton's Int. Law. ch. 2, § 1—could pass such a law as the act of 1831: so could one of a *system of confederated States*—Id. Ibid. § 4; Id. pt. 2, c. 2, § 7. All laws of naturalization proceed upon the assumption of such right, for if a State may prescribe conditions of citizenship, in other words, the mode in which foreigners may become citizens, it may exclude them altogether. 3 Story's Comm. Const. § 1097 to 1099. Puffendorff's Law of Nat. & Nations, b. 7, c. 2, § 20.

* His Honor, the circuit Judge, sustained the demurrer, not because he thought the act of Assembly unconstitutional,—for upon that point he entertained the same opinion as that afterwards expressed by this court;—but, upon the ground—that the terms employed by the Legislature, in defining the offence prohibited, were so general, and wanting in precision, as to leave it a matter of uncertainty and conjecture, what persons were meant by the act. "Persons of color," he thought, included all persons, not white; but it could hardly be meant to exclude from the State, any other persons of color, but those descended from negroes; and there was nothing in the language to restrain the prohibition to that class only of colored persons.

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It is conceded, however, that a member of a "Composite State," such as the government of the United States is, cannot pass laws to exclude citizens of one of the Component States. In this particular they are not sovereign States, more especially when the form of government contains such an article as that above cited. This brings us to the question—*Whether the defendant was a citizen of Kentucky?* If he was he cannot be excluded from Tennessee; and this involves the question,—Who is a citizen?

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Puffendorff says, that—"Since every State is constituted by men's submitting their wills to a single person, or to an assembly, *they* principally have a title to the name of *members*, by whose covenants the society was first incorporated, and they who regularly succeed into the place of these primitive founders. And since these acts belong to the masters of families, they should seem to merit this name by an especial right," &c. See the whole passage, book 7, ch. 2, § 20.

The Legislature of Virginia, by an act passed December 18, 1789, allowed the people of Kentucky to call a Convention—"To consider and determine whether it be expedient for, and the will of the good people of the said district, that the same be erected into an independent State." The members of this Convention were to be elected "by the free male inhabitants of each county, above the age of 21 years, in like manner as delegates to the General Assembly have been elected within said District. Rev. of 1803, p. 50.

The act of December 20, 1785, concerning election of members of that body, ascertains the qualifications of electors of members of the General Assembly, and expressly excepts "free negroes and mulattoes." So that this class of the population of Kentucky had no hand in the Convention above mentioned. This convention was authorised to take the "necessary provisional measures for the election and meeting of a Convention, with full power and authority to frame and establish a Fundamental Constitution of Government for the proposed State." Act of 1789, ch. 14, § 16. Revisal of 1803, p. 50, *et seq.* The Convention thus provided for, framed the Kentucky Constitution of 1792, the first section of the third article of which, provides that—"In elections by

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the citizens, all free male citizens of the age of 21 years," &c. "shall enjoy the right of an elector," &c. 1 Littell's Laws, 27, 28. The Constitution of 1799, art. 2, § 8, provides that "In all elections for representatives, every free male citizen (negroes, mulattoes and Indians excepted,) who," &c. "shall enjoy the rights of an elector," &c.—Id. 40—and this section settles the qualifications of electors in all popular elections, as well as in elections of representatives.

We see, then, that free persons of color are industriously excluded from the right of suffrage in Kentucky; that they were not concerned in establishing the government of the State; it was not by their covenants that the society was incorporated, and consequently, their successors are not citizens, according to the description of a citizen cited from Puffendorff.

The definition of *civis* and *civitas*, in the Latin Lexicon of Forcellini, a work which "has superseded all other Latin Dictionaries," Penny Cyc. art. Facciolati, is entirely conformable to this view of the matter. *Civis*, he says, is *homo liber, urbis, aut oppidi incola, et eodem cum ceteris jure utens*; a free man, an inhabitant of a city or town, using the same law with the rest. *Civitas* is—*civium multitudin eodem loco habitans, eodemque jure vivens*; a number of people inhabiting the same place, and living under the same law. Here *equality of civil rights* is made the test of citizenship; as in Puffendorff, *participating in the mutual covenants by which the society was incorporated*, is made the test of social membership. In *Amy v. Smith*, 1 Littell's R. 326, the Court of Appeals of Kentucky say—"No one can be a citizen of a State, in the correct sense of the term, who is not entitled, upon the terms prescribed by the institutions of the State, to all the rights and privileges conferred by those institutions upon the highest class of society." See the case from page 331 to 335.

Upon the citizen of Kentucky, who comes into Tennessee, no office, duty, part, charge, trust, post, employment, function, burden, impost, tax or obligation, shall be imposed, which is not, at the same time, under similar circumstances, imposed upon the native citizen of Tennessee. This is what

the constitution means when it provides for sameness of *immunities*. But this is not all. The citizen of Kentucky migrating to Tennessee, shall have title to demand, upon the same terms, from the government of Tennessee, whatever prerogative, license, special right or grant is allowed to native Tennessee citizens. This is what is meant by sameness of *privileges*. It has been sometimes supposed, but erroneously, that the words immunity and privilege in this clause of the constitution are synonymous, and that the phrase is a pleonasm. 3 Harris & McH. 553.

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This Union is a State. Its territory is one and indivisible. Whoever is a member of any one of the separate societies which co-exist within that territory, is, for that cause, a member of all and every of those societies. He is a member of the Composite State, and, therefore, is also a member of the component States. Being born upon that territory, though of parents who are not members of the State, invests the infant with the right of membership. The children of English parents born upon our territory, are citizens of the United States.— But would the children of native Africans, immigrants to this country, be citizens by birth? The English immigrant, if a “free white person,” may be naturalized: the African cannot. Can the offspring of those who are incapable of citizenship become citizens? The free white man, when naturalized, is, *ipso facto*, clothed with all the immunities and privileges which are enjoyed by the native citizens of the Union, and every component part of it: and with all their rights too, eligibility to the Presidency and Vice-Presidency excepted. The free white man, born within the United States, is entitled to all the privileges, immunities and rights of American citizenship, be his parents of whatsoever nation. See Vattel, book 1, c. 19.

But birth will not confer these advantages upon a negro or an Indian. If so, a man may acquire by the accident of birth, what the government itself has no right to grant. No negro, or descendant of negroes, is a citizen of the Union, or of any of the States. They are mere “sojourners in the land,” inmates, allowed usually by tacit consent, sometimes by legislative enactment, certain specific rights. Their *status* and that

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of the citizen is not the same. Vattel, book 1, § 213. But the clause of the Constitution in question, applies to *citizens*, not to sojourners or inmates. The attribute of sovereignty, whereby independent States may exclude foreigners from their territories, at pleasure, is taken, by the people of the Union from the States, as it relates to those who are *citizens* of the component States; but that attribute remains as to all those who are not such citizens. New York may pass laws to exclude foreigners from landing or coming within its limits. But if these foreigners land in any State from which they are not excluded, and are there naturalized, New York can no longer exclude them.

Undoubtedly, there may be in a State, a class of people with limited privileges and immunities, who may still be called "citizens," but it is not in this sense that the word is used in our Constitution. See 1 Niebuhr's Hist. after 965; Potter's Greek Ant. book 1, c. 10—particularly page 73, Boyd's Ed. Glasgow 1837; Vattel, book 1, sec. 213. The words are: "The citizens of each State shall be entitled to *all* the privileges," &c. The citizens meant in this provision are those who are entitled to all, not some privileges and immunities.—But free negroes are not entitled to *all* the privileges of white persons in any of the States. They, therefore, are not citizens in the sense of the Constitution.

January 2.

NICHOLSON, with whom were PILLOW and E. H. EWING, argued that the crime is *malum prohibitum*, and exists only by statute. Of what does it consist? 1st. Removal to the State; 2nd, to reside therein; 3d, remaining 20 days. Yet all these ingredients may concur and no crime be committed. There is still a fourth requisite. The person removing, &c. must be a person of color; and even then the offence is not made out; he must be *free*.

Penal statutes are taken strictly and literally in the point of defining the *fact* and the *punishment*. Dwaris Stat. 736.—Part of the fact to be "strictly defined," is the character of the supposed offender as to complexion. The words of the statute are "free person, of color." We may know as individuals, that "free negroes" are intended by the statute, but we do not derive this knowledge from its language. The words

will embrace all persons of all shades of complexion; strictly speaking, they will apply to all persons except those of the African or black complexion. How then are we to arrive at the offenders intended to be described? Must we draw our conclusion from the construction of the words, "who have been emancipated," &c., and by connecting them together, construe the whole description as meaning free negroes? This mode of making out the offence will not answer, because it is well settled that the law does not allow of constructive offences. No man incurs a penalty unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty. 3 Bing. 580.

We are not helped out of this difficulty by any statute of the State defining the term "free persons of color." When the phraseology of this statute is compared as to its generality and ambiguity, with several penal statutes of England, which have been construed, it is apprehended that the conclusion is well founded, that no such offence is here described as can be punished.

By statute of 1 Ed. 6, c. 12, persons convicted of stealing *horses* should not have the benefit of clergy. The courts were of opinion that this did not extend to him who stole one horse. In like manner, by the 14 G. 2, c. 1, persons who should steal sheep or *any other cattle*, were deprived of clergy. Most clearly these words would embrace bulls, cows, heifers, &c., yet they were looked upon as too loose to create so high an offence. This latter case would seem to apply with peculiar force to the statute under consideration. So far as the stealing of sheep was enumerated, the statute was good, but beyond that it defined no punishable offence.

In this case there is not any particular enumeration, but the whole description of the offender is so general, that it cannot with certainty be applied to free negroes more than to other free persons who are colored, such as the tawny Asiatic or copper-colored Indian.

This act creates a highly penal offence, one which abridges the liberty of a freeman, and therefore ought to receive the strictest construction. 4 Bing. 183.

2. But the act is a violation of the Constitution of the U.

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S. art. 4, § 2. At most the State can only claim the right to restrict the privileges of this class of freemen, so as to allow them such only as persons of the same description are entitled to in Tennessee. 2 Kent, 71.

The history, however, of the admission of Missouri into the Union, shows that the then Congress was of opinion that a clause in the Constitution of that State, directing the Legislature to pass laws, "to prevent free negroes and mulattoes from coming to and settling in the State," was a violation of the provision of the Constitution of the U. S. in question. Accordingly, the resolution, providing for the admission of Missouri, declared it to be on condition that that "clause in her Constitution should not be construed to authorise the passage of any law, and that no law should be passed in conformity thereto, by which any citizen of either of the States, in the Union, should be excluded from the enjoyment of any of the privileges and immunities to which such citizen was entitled under the Constitution of the United States." Serg. Const. Law, 384, 5. It was a work of supererogation to make the provisions, except upon the ground that free negroes and mulattoes were to be regarded as *citizens* of the respective States in which they might reside.

It is not pretended that this is a conclusive exposition of the constitutional provision under discussion; but it is certainly entitled to great weight and consideration. 2 Kent, 258, note *d*.

3. This statute is also a violation of our own Constitution, Art. 1, § 8, for it provides for "exiling a freeman" without law, unless the question of its constitutionality be first settled, or taken for granted. 2 Yerger, 260, 554, 599.

January 4.

GREEN, J. delivered the opinion of the court.

The defendant was indicted in the Circuit Court of Maury County, under the act of 1831, ch. 102, as a free man of color, emancipated in Kentucky, for removing into this State and residing here, more than twenty days. To this indictment he demurred, which demurrer was sustained by the court, and the Attorney General prosecutes this appeal on behalf of the State.

Several grounds have been taken to sustain the judgment of the circuit court; but that which is chiefly relied on is,—that the act in question is unconstitutional, being repugnant to the provisions of the 2nd Section of the 4th Article of the Constitution of the United States. That section provides, that “The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.”

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The enquiry then is, whether the defendant, a man of color, emancipated in Kentucky, was a citizen of that State in the sense of the constitution?

Who then is a citizen? Chancellor Kent says, 2 Com. 258, note, that the term is “appropriate to republican freemen;” and certainly among the Romans, where the term had its origin, a citizen was entitled to all privileges, immunities and rights, civil and political. Free negroes have always been a degraded race in the United States, having the right, it is true, of controlling their own actions and enjoying the fruit of their own labor, but deprived of almost every other privilege of the free citizen, and constituting an inferior caste in society,—with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom, the laws have never allowed the enjoyment of equal rights, or the immunities of the free white citizen.

As this was the description of these people, at the time the Constitution was adopted, can we understand the word “citizen” as used in the section under consideration, as applicable to them?

“The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,” says the Constitution. The citizens here spoken of, are those who are entitled to “all the privileges and immunities of citizens.” But free negroes, by whatever appellation we call them, were never in any of the States, entitled to all the privileges and immunities of citizens, and consequently were not intended to be included, when this word was used in the Constitution.

In this country, under the free government created by the Constitution, whose language we are expounding, the humblest white citizen is entitled to all the “privileges and immu-

At the time the Constitution was adopted, the free negroes were not considered as citizens, and consequently were not entitled to all the privileges and immunities of citizens.

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nities" which the most exalted one enjoys. Hence, in speaking of the rights, which a citizen of one State should enjoy in every other State, as applicable to white men, it is very properly said, that he should be entitled to *all* the "privileges and immunities" of citizens in such other State. The meaning of the language is, that no privilege enjoyed by, or immunity allowed to, the most favored class of citizens in said State, shall be withheld from a citizen of any other State. How can it be said, that he enjoys *all* the privileges of citizens, when he is scarcely allowed a single right in common with the mass of the citizens of the State?

It cannot be;—And, therefore, either the free negro is not a citizen in the sense of the Constitution; or, if a citizen, he is entitled to "all the privileges and immunities" of the most favored class of citizens. But this latter consequence, will be contended for by no one. It must then follow, that they are not citizens.

But it is contended that they are an inferior order of citizens, subject to many disabilities, and that when they remove into another State, they are entitled to all the "privileges and immunities," which free negroes in such State enjoy.

In the first place, this argument is already refuted, if we have shown, that a person entitled to *all* the privileges and immunities of citizens, cannot be restricted in any rights which any class of citizens exercise. But if this construction were allowable, it would not avail the defendant any thing. By the act of 1831, c. 102, s. 2. Slaves, who may be emancipated, are required to leave the State, and the owner desirous of emancipating a slave, must give bond and security in a sum equal to the value of the slave, conditioned that he will forthwith leave the State. The introduction of a resident negro, into the class of the defendant, by emancipation, would entitle him to no "privilege or immunity" in this State, but he must forthwith remove his residence from it. How then, according to the argument, can he be entitled to any privilege or immunity here? Nor would it seem consistent policy, to drive an emancipated slave from us, whose habits and character are known, and permit the introduction from abroad,

without restriction, of others whose characters are unknown, and from whom there may be greater dangers.

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Upon the whole, by whatever appellation we may designate free negroes, whether as perpetual inhabitants, or citizens of an inferior grade, we feel satisfied, that they are not citizens in the sense of the Constitution; and, therefore, when coming among us, are not entitled to all the "privileges and immunities" of citizens of this State.

2. It is contended that this act is in derogation of the 8th section of the bill of rights of this State. We think the word "Freeman" as used in the bill of rights, is of equally extensive signification with the word citizen as used in the Constitution of the U. States; and that although the defendant by his emancipation in Kentucky, obtained a qualified freedom, he did not become a "freeman" in the sense of *Magna Charta*, or of our Constitution.

In these instruments, the word is used in its largest sense, and means, as does citizen in the Constitution of the United States, one who is entitled to all the privileges and immunities of the most favored class of the community.

An emancipated slave, is called a freeman in common parlance, and in reference to his former state, he is so, having acquired privileges and immunities which he did not enjoy before. But in reference to the condition of the white citizen, his condition is still that of a degraded man, aspiring to no equality of rights with white men, and possessing a very *few only*, of the privileges pertaining to a "freeman" or "citizen."

But this provision of our Constitution can only apply to our own citizens, and not to foreigners. If this law applied to Englishmen or Frenchmen it would be constitutional, were it not for treaties and naturalization laws; for surely every free State has a right to prevent foreigners going to it, and to punish those who violate such laws.

The language must therefore be restricted to *freemen of this State*, for the protection of whom, alone, the provision is made.

Judgment reversed, and cause remanded.

McCOLLUM vs. SMITH.

CONFLICT OF LAWS. *Power of a state over property within it—slaves in Louisiana.* Every state may impress upon all property within its own territory, any character, which it may choose, and no other state or nation can impugn or vary that character. In Louisiana, slaves, though moveable by their nature, are immoveable by operation of law.

SAME. *Descent of immoveables.* The descent and heirship of immoveables are exclusively governed by the law of the country within which they are actually situated. This is the doctrine of the common law. Story's Conf. § 483.

SAME. *Descent in Louisiana among intestate's children in general, and when some or one of them is a feme covert and nonresident.* By the laws of Louisiana, all the legitimate children of an intestate "participate to his succession by equal shares." Code of 1808, B. 3, Tit. 1, c 2, § 2, art. 27. If one of these children be a married woman, her share of the immoveables of the succession, vests in her as paraphernal property, and she holds it independently of her husband, and she is entitled to the administration and enjoyment thereof, Civil Code, La. p. 331, though she be domiciled in Tennessee with her husband. But her husband is entitled to her moveables wherever situated as her administrator in Tennessee.

SAME. *Acquisitions after marriage—change of domicile.* The law of the actual domicile of husband and wife governs as to moveable property acquired after a change of residence, and as to all immoveable property, the law of the place where it is situated. Story's Conf. § 137.

John Dodd, of the parish of Iberville, Louisiana, had five children, a son, William, and four daughters, Elizabeth, Sally, Letitia and Tamsey. The last intermarried first with one William Salsbury, by whom she had a son, William. On the death of Salsbury, her husband, she intermarried in March, 1810, with Edwin Smith, by whom she had two daughters, Zilla Willson, born before the marriage, but recognised by Smith as his child, and Sally Argadine, born afterwards. In April, 1815, Smith was appointed guardian of William Salsbury, by the county court of Davidson.

About the 10th of December, 1815, John Dodd died intestate, at his residence in Louisiana, seized and possessed of a considerable estate, consisting of lands, slaves and other property, his five children above named surviving him. In January, 1816, Smith and his wife heard of her father's death; and they immediately joined in a sale of her interest in his estate to one Wright, for \$2400, for which sum Wright gave his notes. Mrs. Smith herself died suddenly in February afterwards, and Smith rescinded the contract with Wright and gave him up his notes. He then repaired to

Louisiana, and there, on the 30th of March, 1816, joined the other heirs of John Dodd, in an application to the parish judge, as appears from his record, "that a sale of the property belonging to the said succession might be decreed in the shortest delay that the law would allow;" the said heirs declaring that they believed it would be for the interest of all parties concerned, that the said property be sold on the following terms, that is to say, the personal property payable in the month of March, 1817; and the land and slaves, payable one third in March, 1817, one third in March, 1818, and one third in March, 1819.

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In making this application, Smith claimed one share as "guardian of William Salsbury, a minor child, and heir of the said deceased, in the right of his deceased mother, Tamsey Dodd; and as representing "the rights of Zilla Willson Smith and Sally Argadine Smith, minor children, issue of the said Tamsey Dodd, deceased, and said Edwin Smith." "A liquidation and partition of the succession of John Dodd, between his five heirs, viz. William Dodd, Elizabeth Goodwin, the children and heirs of the late Tamsey Dodd, represented by their guardian, Edwin Smith,—Sally Lowe, represented by Philip Pipkin and Edwin Smith, her assigns, and Letitia Dodd, wife of Placide Leblane," was made on the 17th of April, 1817, when the net proceeds thereof, were stated at 16,688 dollars, and the share of each heir, less nine dollars, at \$3,328 60 cents. The record then stated the allotments of the first instalment, and proceeds—"And the said co-partners do hereby transfer, assign and set over the several obligations, credits, rights and actions, as contained in the lots aforesaid, to the several persons by whom they have been drawn as above, or to whom they have been assigned, to balance their accounts." The said co-partners then proceeded to divide the sums due on the second and third payments of March, 1818, and March, 1819; and agreed that the heirs of Tamsey Dodd and Sally Lowe, represented by Philip Pipkin and E. Smith for their two several shares, do take the amount due from Louis Mairouneau, being eighteen hundred and eighty-one dollars and sixty-two cents and two thirds, at each payment, and one hundred and

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sixty-three dollars, ninety-four cents, of what is due by W. Dodd on the purchase of slaves at each payment;" and then after stating these allotments in figures, the record concludes—"And the copartners do hereby transfer, assign, and set over the several obligations, credits, rights and actions as contained in the lots aforesaid, to the several persons to whom they have been assigned as above, to balance their accounts. Thus done and passed in my office this 29th day of April, in the year of our Lord, one thousand eight hundred and seventeen, causing the parties interested, herein, to sign in presence of N. Meriam and Antoine Devillies, witnesses hereunto required," and then the paper was signed by the parties, and the witnesses, and the parish judge.

Smith obtained from William Salsbury, when he came of age, the following receipt—"October 21, 1826. I this day have settled with Edwin Smith, for being guardian for me, and received of him two thousand and fifteen dollars." (signed,) "William Salsbury," and witnessed by Tillman S. Hunt." Salsbury died intestate, on the 19th of December, in the same year.

On the 18th of August, 1833, Sarah A. Smith executed a deed, in which reciting that she was entitled to a distributive share of John Dodd's estate, as heir of her mother, and to a distributive share of the estate of her brother, William Salsbury; that her sister Zilla, having been born out of wedlock, could not represent them; that her husband, John D. McCollum had taken much pains and trouble, and been at much expense in travelling from this state to Louisiana to examine into and adjust said business; in consideration of the premises, she conveyed, and assigned, to said McCollum and wife the one half part or portion of her interest in both said estates, and empowered McCollum and her sister to sue for and recover the same for their own use, &c.

After Sarah had executed this paper, Smith obtained from her a receipt, which was witnessed by Frederick Bradford and John Lowe, in the following words:—

"Received of Edwin Smith, two thousand dollars in money and property, and other considerations, in full of all accounts, dues and demands; and particularly in full for his

guardianship of my property, during my minority, being satisfied in full, and I release, acquit and discharge him for ever in full. Witness my hand and seal this 29th September, 1833."

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Afterwards, Sarah intermarried with Joel S. Reid, who by his deed of the 15th of January, 1835, confirmed his wife's deed of the 18th of August, 1833, covenanting that McCollum might use his and his wife's name in attempting to recover said estate, and that he, for himself and wife, would join McCollum in any suit in law or equity which might be brought for the same.

Accordingly, on the 15th of April, 1835, McCollum and his wife, and Reid and wife joined in a bill in the Chancery court at Franklin against Edwin Smith, stating the facts here recited, and praying that he might be compelled to show what he had paid for the receipts obtained from his wards, Salsbury, and Sarah A. Smith; what property or money of said Salsbury came to his hands; what amount of money he had received from the estate of John Dodd, as guardian of Salsbury, Zilla, and Sally; that an account might be taken of these several particulars; and that he might be decreed to pay them what should be found due them on the account.

On the 30th of April, 1835, Smith filed his answer, in which he insisted that by the proceedings in Louisiana, he did not intend to relinquish his interest in the property of John Dodd; that the receipt from Salsbury was executed after his majority, fairly, freely and *bona fide*, he having suffered Salsbury to take possession of his property, advanced money to him from time to time; that Salsbury held a note on him for about three hundred dollars, which he was ready to pay to his administrator when one should be appointed; that his daughter Sarah, having, after executing the deed to McCollum, of the 18th of August, 1833, informed him thereof, and that she did not wish him made responsible in any way, he told her he could make a charge of what money he had advanced her during her minority, and for her support, and she could give him a release if she thought proper; and she thereupon executed the receipt of

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the 29th of September, 1833, freely and voluntarily, and without any fraud; that he is entitled to all the personal estate of John Dodd, including the slaves, the proceeds of which he received in Louisiana; because, as his wife was domiciled in Tennessee at her death, the succession to personal estate would be governed exclusively by the laws of Tennessee; that by the laws of Louisiana, he would be entitled to one half of the real estate absolutely, if those laws recognise, in matters of succession, the law of the matrimonial domicile; and that he would be entitled to the proceeds of the real estate during his life, being accountable for the value of the capital, considered as real estate at the time of his death. And the answer concluded by stating, that the defendant had taken letters of administration to his wife, and he produced his letters, which were tested as of the third Monday of April, 1835.

The complainants, McCollum and Reid had themselves appointed administrators of W. Salsbury, and filed an amended and supplemental bill, stating the fact. On the 3d of November, 1836, they filed another amendment to their bill, charging that, by the laws of Louisiana, land and slaves are immovables, and those of Dodd's estate did not vest in Smith as husband of Tamsey Dodd; that upon her death they vested in complainants and William Salsbury, and the proceeds after the sale belonged to them; that William Salsbury's interest, after his death vested in complainants, Sally and Zilla; that movables, by the laws of Louisiana, are to be applied to the payment of the debts of the deceased, and that those of John Dodd were sufficient to pay his debts, &c.

Smith in answer to this amendment, denied that the laws of Louisiana were as complainants supposed, and required proof. He insisted that Mrs. Smith's share of John Dodd's slaves would be governed by the laws of Tennessee, and would vest in him on her death, and he would be entitled to them as her administrator and next of kin. And he declined admitting any of the matters of fact, or conclusions of law, or inferences stated in the amendment, and required full and strict proof thereof.

At April Term, 1837, by consent of counsel, his Honor Chancellor BRAMLITT, referred it to the clerk and master, *Litton*, to report what the law of Louisiana was, at the death of John Dodd, upon the following points—1. Whether slaves are, by that law, movable or immovable property? 2. Does immovable property, which descends to a married woman from her father, upon her death intestate, belong to her heirs or children, or to her husband? 3. Whether the law of Louisiana makes any difference as to descent of immovable property, when the party on whom it is cast is not a citizen, and when he is a citizen of the state of Louisiana?

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On the 18th of October, the clerk and master filed his report, stating from the Digest of the Laws of Louisiana, published in 1808, the provisions which he supposed to bear upon the inquiries referred to him, and his conclusion therefrom, as to each inquiry. And he stated that those provisions were in force at the death of John Dodd, and had remained unaltered, as appeared by the deposition of Alexander Barrow, Esq., which he submitted with his report.

Testimony was taken by the parties in reference to the receipts executed to the defendant by Salsbury, and by his daughter, the complainant, Sarah; and upon some other matters unimportant to the questions debated here, or irrelevant to the issue. As to the receipts, the testimony did not satisfy the chancellor, that Smith had paid, the sums of money specified in them to Salsbury, and his daughter. There was testimony also, showing that Smith was of sufficient substance to support his daughter without trenching upon her estate.

At November Term, 1837, the cause was heard by Chancellor BRAMLITT, who being of opinion that the receipts formed no obstacle to the relief asked for by the complainants; and that complainants, Zilla and Sarah, were entitled to their mother's share of the lands and slaves of John Dodd, decreed an account of the proceeds of them against Smith, and that the clerk and master should state his account as guardian; that the defendant should be charged with one half, being Salsbury's portion, of the proceeds of said lands

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and slaves, and with compound interest thereon from the time he received it, until Salsbury's majority, and simple interest afterwards till his death; that he should be credited with a reasonable yearly allowance for the support and maintenance of Salsbury from 1810 until his death in 1816; also with any sums of money paid Salsbury after his majority, "and any small or reasonable sum" before that time; and with the value of any property received by Salsbury; that the defendant should be charged with simple interest only on the share of Sarah, and allowed nothing for her support, and that he should pay costs.

From this decree he appealed in error.

E. H. EWING & MEIGS, for the complainant.

1. As to *movables*, in Louisiana, to which Tamsey Dodd Dec. 21, 22, 24. was entitled by succession to her father, it is admitted, defendant's marital rights are according to the laws of Tennessee, the place of the matrimonial domicile. 1. By a principle of international law; Story's Conf. § 186. 2. By the law of Louisiana itself; Code of 1808, Book 3, Tit. 1, Art. 163, p. 186.

2. As to the *immovables* of John Dodd's succession, the title is regulated by the laws of Louisiana. From and after the 10th of Dec. 1815, one-fifth of them were the property of Tamsey Smith. What were her husband's rights to them during the marriage; that is, in this case, from Dec. 10, 1815, to Feb. 28, 1816, appears from the same Code, page 334, § 111, Arts. 56 et seq., and page 186, Art. 168, and page 52, Arts. 42 et seq.

After the death of Tamsey Dodd, the father ceased to have the usufruct, secured by law—*during the marriage*—to the parents; and then the relation of *guardian and ward* commenced between him and his children. See Code, page 57 of Tutorship by Nature.

"During the marriage," the relation of *parent and child* continued; by virtue of which, the usufruct of the estate of the children belonged to the parents, that is, in the words of the Code, page 52, Art. 42, "fathers and mothers shall have during marriage the enjoyment," &c. But as soon as one of the parents dies, the relation of guardian and ward commences

between the survivor and the children, and the guardian is accountable both for the property and revenues of the estate. Code, page 58, Art. 5.

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3. But in this case, in point of fact, Edwin Smith did assume to act as the natural guardian of his children, in which capacity, he did all the various acts which are necessary by the Code to divide an inheritance among the co-heirs. All of which will be seen in the Code of 1808, Book 3, ch. 8, page 184.

Art. 145, shows by what title the heirs are seised of the inheritance upon the death of the ancestor.

Art. 162, and Arts. 171 et seq. show that after the partition, the heirs are alienees and vendees mutually. See page 366, ch. 6, Arts. 118, 119, 120.

Arts. 237 et seq. show that they are mutual warrantors.

This partition was judicial,—see Arts. 165 et seq., and the acts of the Parish judge in receiving the petition for partition; ordering and conducting the sale; forming the mass of the inheritance; auditing the demands of creditors; ascertaining the net residue; drawing the lots; adjudicating the allotments in severalty, were all judicial in their nature; all of which, constituting the entire partition, also constitute a judgment *in rem*, of a court having jurisdiction of the *persons* claiming, and of the *subject matter* claimed. See Story's Conflict of Laws, c. 15—especially § 591, 592.

And such a judgment is conclusive upon all the world as to all the matters of right and title, which it professes to decide. Least of all persons in the world, can Smith impeach this judgment, having been himself a party to it, and having acquiesced in it 19 years.

JAMES CAMPBELL, for the defendant.

In this case both the parties claim the proceeds of certain negroes, &c., in Louisiana, under Tamsey Smith, the wife of Edwin Smith, and mother of complainants. Edwin Smith and wife were citizens of Tennessee.

1. As the *domicile* of Mrs. Smith was in Tennessee, the laws of Tennessee would govern in the distribution of personal property, and the *lex loci rei sitae* as to the realty; Story's Conflict of Laws, § 481, 483.

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2. Lands and houses, and other things *which are deemed part of the freehold*, or which savour of the realty are real estate or immovables—all other things which are movable in their nature are personal property. *To make a thing realty, it must be attached to some freehold.* The distinction between real and personal property exists in the things—it is the ideas in the mind and not the words employed that can make a thing real or personal property; Story's Conflict of Laws, § 447.

3. The principle laid down in this section of Story's Conflict of Laws, that every nation can impress upon property what character it pleases, only applies to cases where the sovereignty is complete, not to cases of a divided jurisdiction the owner being in one State, and the property in another. But supposing that a State, under the principle stated, could make personal property a part of the land, or "*annex it to the freehold*," the law of Louisiana, in this case, does not do it. *It does not annex negroes to any freehold*, but merely says slaves shall be immovable by operation of law, and therefore they may be mortgaged, &c. It is the annexing a thing to the freehold that makes it realty. The negroes in this case must be regarded as movables or personalty, because they are movables in fact and are not attached to the realty.

4. Our statute of distributions is positive in its provisions. So are the statutes of descents of Louisiana. Where the owner of property is in one sovereignty and the property in another, and a conflict arises, the disposition must be settled upon a principle independent of both. That principle or rule is, that the law of the domicile must govern as to personalty, and the law of the place where the property is situate must govern as to the realty. And so strong is the principle, that if a citizen of a State acquires property under a foreign judgment or decree contrary to the rule I have mentioned, he will be held liable to the person who would be entitled under the rule, and made to hold as a trustee for him; Story's Conflict of Laws § 409; see also § 20. The authorities on this subject are collected in the 9th chap. of Story's Conflict of Laws, to which the court are referred, 4 J. C. R. 487.

5. The laws of Louisiana do not contravene the principles

contended for, but if they did Tennessee would not in her courts give effect to those laws in opposition to her own, and in opposition to the law of nations. If Louisiana can by the mere application of a word, change the character of the property, she is evading the principle. The law then would be no law at all.

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F. B. Fogg, on the same side.

Article 163, page 186 of the Dig. of La. relied upon by Mr. Meigs, applies only to the rights of the husband *during* marriage, and has no relation to the rights of the husband to his wife's movable effects after her death. The right of succession is precisely the same as to movables as *immovables*, there is no distinction between them. Succession applies to "the estate, rights and charges of the deceased which pass to other persons who replace them." Book 3, Title 1, Chap. 1, Art. 1, Dig. 144. The husband has no right except to the partnership property, in any thing movable or immovable, where the wife has lawful descendants.: page 154, c. 3, art. 43.

See page 324, art. 13—Proper or hereditary effects are all such as either husband or wife brings in marriage, or which he or she inherits or acquires during marriage, by will or lucrative contract,

Dig. p. 52; Art. 42, 43; Fathers and mothers during marriage have the enjoyment of the estate of their children until their majority. They are usufructuaries, and by Art. 47, children cannot sue them. The father is liable as an usufructuary; how that is, see p. 110; also 114, Art. 22, 23 54.

I refer the court also to the case of *Lashley v. Hog*, Robertson on Personal Succession, p. 234; 12 Law Library, side paging, 416; also *Stanley v. Bernes*, 5 Ecclesiastical Rep. 140, 161; 9 Bligh's Rep. 32, *Britwhistle v. Vandell*; Id. 89, *Wanender v. Wanender*; 4 John. Ch. Rep., *Holmes v. Rensem*, 461; 2 Id. *Decouche v. Savatier*.

When there is a father or mother, the courts of Louisiana have no power to appoint a curator or guardian. The father has the rights of an usufructuary, unless the donation made to the child prohibits it; 6 La. Rep. 236.

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GREEN, J., delivered the opinion of the court.

The complainants Zilla and Sally, are the children of the defendant, by his former wife Tamsey. Tamsey was the daughter of John Dodd of Louisiana, who died in that State, possessed of considerable estate, about the 1st of December, 1815. Mrs. Smith and her husband, the defendant, lived in Tennessee, where she died in February, 1816, before any measures were taken to obtain her share of her fathers estate. Her only children surviving her were, the complainant, Zilla, wife of McCollum, and Sally, wife of Reid, and William Salsbury, a son by a former husband. William Salsbury died in November, 1826, without lawful issue; leaving his sisters, Zilla and Sally, his only heirs and distributees.

The defendant, Smith, obtained his wife's portion of her father's estate in Louisiana, and was guardian of William Salsbury, whose estate went into his hands. This bill is brought by his daughters and their husbands for an account of each of these funds.

The principal question in this cause is, whether negroes are to be regarded in Louisiana as real estate, or personal? For it is not disputed on either side, but that if personal, the law of Mrs. Smith's domicile will govern; and if real, the law of the place where it was situated will control the succession. Story's Conf. L. § 481, 483.

By the law of Louisiana, real estate and immovable things are convertible terms. Dig. 1808, B. 2, c. 2, Art. 13.—And that law, Art. 19, contains the following provision, in relation to slaves—"Slaves in this territory are considered immovable by the operation of law, on account of their value and utility for the cultivation of the lands, and therefore they may be mortgaged."

The chapter from which this extract is made, treats only of immovable things, enumerating what are such and in what sense; whether by their nature, or by operation, or destination of law; and commences with the words, "Real estate or immovable things are," &c. Thereby substituting the terms, "immovable things," for "real estate;" Story's Conf. L. § 447, says, "that in addition to those things which may be deemed universally to partake of the nature of immovables, or,

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as the common law phrase is, to savor of the realty, all other things though movable in their nature, which by the local law are deemed immovables, are, in like manner, governed by the local law. For every nation, having authority to prescribe rules for the disposition and arrangement of all property within its own territory, may impress upon it any character which it shall choose; and no other nation can impugn or vary that character."

If these principles be correct, they settle the question; for Louisiana has said, by its law, that slaves are immovable, and having a right to impress upon them any character it may choose, which Tennessee has no right to impugn or vary, it follows that the law of Louisiana must govern the succession.

It is earnestly argued, that this language of Judge Story must be restricted in its meaning, to such things, movable in their nature, as are by law attached to the land; and are thus made to savor of the realty. This is plainly a misconstruction of the author; for he says expressly, that in addition to the things that are universally considered to savor of the realty, "all other things, though movable in their nature, which by the *local law* are deemed immovables, are in like manner governed by the local law." Thus plainly intending to assert the power of a nation to impress any description of property, with the character of "immovable;" whether connected with land or not.

But it is insisted, that no State has a right to do this; and thus give to property, movable in its nature, a destination, different from that, which by the law of nations would be given to it, were there no such local law.

If this argument be well founded, the power, by law, to attach movable property to the freehold, and thus constitute a part of it, would be equally beyond the competency of a State. Is it not as easy to declare, in an act of assembly, that horses for the plough shall constitute part of the freehold, and *thus* make them immovable,—as to announce simply, that horses shall be immovable property? It is certainly difficult to perceive upon what principle, the competency to enact the former provision can be maintained, while the power to make

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the latter is denied. And yet the power to attach, by law, things in their nature movable to the freehold, and thus make them immovable, is not denied in the argument;—and, indeed, could not be, for the common law, as well as the civil law, recognises some things movable in their nature, as part of the freehold. This right to impress upon movable things, the character of immovables does not depend upon their relation to the freehold, but results from the power inherent in every nation, “To prescribe rules for the disposition and arrangement of all property within its own territory.” When this shall be done the law applicable to immovables governs the disposition which must be made of such property.

It is insisted that the law of Louisiana referred to was not made with a view to the succession, but that, as only immovables are there subject to mortgage, slaves on account of their value, were impressed with the character of immovable with the view only of making it lawful to mortgage them.

This is evidently a misconstruction of the law. It is true, that after announcing that slaves are immovable property, it is added in the digest of 1808, “And therefore they may be mortgaged.” But this is stated as a mere consequence, or incident, resulting from the character with which the property had been impressed by law. The chapter is not treating of mortgages, or securities, but of the *character* of property, defining what things are immovable in contra-distinction to movable things. To put it beyond doubt, that such is the true construction of this article, it will be perceived by reference to the civil code of Louisiana of 1825, Book 2, Tit. Ch. 2, Art. 461, that the words, “And therefore they may be mortgaged,” are omitted altogether. The language of that article is, “Slaves, though movable by their nature, are considered as immovables by operation of law.

Thus we have a legislative construction of the article in question, removing all doubt.

These principles having been established, let us apply them to the case under consideration. We have seen that John Dodd died in Louisiana in 1815. His daughter Tamsey, wife of the defendant Smith, him surviving, then resided in Tennessee, where she died in 1816.

In relation to immovable property, the descent and heirship is exclusively governed by the law of the country, within which it is actually situate. "No person can take except those who are recognised as legitimate heirs by the laws of that country; and they take in the proportions and order which these laws prescribe." "This," says Judge Story, "is the indisputable doctrine of the common law;" Conf. L. § 483. By the law of Louisiana; Dig. Civ. Code., B. 3, Tit. 1, Ch. 2, § 2; Art. 27, p. 150; when a man dies all his legitimate children "participate to his succession by equal shares."

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John Dodd had five children, of whom Mrs. Smith was one, so that she became entitled to one-fifth of all her father's estate.

This vested in her as paraphernal property; and as the law of Louisiana governs, as to the land and negroes, being immovables, that portion of the estate was held by her independently of her husband, of which she had the administration and enjoyment. Civil Code, La. 334. This property remained undisposed of, and undivided until after the death of Mrs. Smith in 1816. Upon her death by the law of Louisiana, the succession to all her property in that State, is participated by her children. But as that law governs only as to the immovable, Story's Conf. § 483, the defendant, her husband, as administrator of her estate in Tennessee, is entitled to her movable effects; and is not bound to account for them to her children. Story's Conf. § 481.

But it is insisted, that as Smith and wife were married in Tennessee, that contract was made in reference to the law of Tennessee, and, therefore, all their matrimonial rights are to be governed by that law. This question has called forth much ingenious discussion on both sides. It is unnecessary to add any thing of ours, other than to announce the result of our investigation of the subject. We think that, however, the domicile of the parties may be changed, the law of the actual domicile will govern as to movable property acquired after such change of residence, and as to all immovable property, the law of the place, where it is situated. Story's Conf. L. § 187.

Upon these principles, the complainants are entitled to an

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account for the estate of their mother, which may have come into the hands of the defendant.

Indeed, if these principles were less clear and satisfactory, than they appear to be, the manner in which the defendant has treated the subject, recognizing the rights of his children in the proceedings in Louisiana, acting as their guardian in the division of their grandfather Dodd's estate, and receiving their portion in that character, are circumstances which tend strongly to support their claim to the account they seek.

He could not have obtained the property in Louisiana in any other character than as guardian for his wife's children; nor did he ever set up any right to it until this bill was filed. He told Mrs. Woodson, his step-daughter, that his daughters were worth more than she was. In requiring him to account for this estate, therefore, in accordance with our views of the rights of the parties, he will only do what he has all along felt himself bound to perform.

But the defendant insists in his answer, that he has settled with the parties entitled to this estate, and therefore he is not bound to account.

To support this allegation in the answer, he has produced a receipt from the complainant Sally, dated 29th September, 1833, wherein she acknowledges the receipt from him, as guardian, of two thousand dollars in money and property in full of all demands.

The evidence shows that this receipt was obtained from his daughter without consideration; no money having been actually paid. That his daughter was young, lived in his house, was very much under his control and influence, and most probably did not know what was the character of the paper she signed. There is no pretence for setting up this receipt in opposition to the account prayed for.

The defendant also relies upon a receipt from William Salsbury, dated October 21, 1826, for two thousand and fifty dollars, in which a settlement is acknowledged to have been made with Smith as guardian, and that sum received.

It is insisted, that this receipt is valid, and ought to be conclusive as to Salsbury's share of the estate; for that, although it may appear from the evidence, that Salsbury did

not receive this sum, still he was of age, gave the receipt voluntarily, and that he had a right to give his estate to Smith if he chose to do so.

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This view of the subject presents] some difficulty in the mind of the court, and had the defendant treated it in this manner, we should have hesitated before we would have pronounced it invalid. But the defendant in his answer, alleges that he had advanced money to Salsbury from time to time, and had permitted him to take possession of his property, and after he became of age, settled with him and took his receipt. He thus puts his defence upon the ground, that he had actually paid Salsbury his distributive share of both his fathers and mother's estate.

But it satisfactorily appears from the evidence, that such was not the fact. At the time the receipt was executed, no money was paid, no note was given, no property was delivered; and Salsbury dying shortly afterwards, left no visible estate, save a horse or two, known to any of the witnesses. It is in proof too that Salsbury was not an extravagant young man.

It is impossible, therefore, to believe that Smith actually paid the money mentioned in this receipt; and as he has placed the question of its validity upon an actual payment, and not as a gift from Salisbury, we cannot regard it as a gift, and being satisfied the money was not paid, we are of opinion it presents no obstacle to the account the complainants ask, of Salsbury's estate in his hands.

Let the decree be affirmed.

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CHANCERY. *Specific performance—title bond assigned.* If a title bond be assigned by the obligee, and the assignee sue the obligor in equity for a specific performance, making the obligee a party, the obligor cannot resist a decree on the ground that no consideration passed for the assignment,—the bill being taken for confessed as to the obligee.

SAME. *Same—Vendor and purchaser—lapse of time.* Lapse of time is a defence against a bill for a specific performance, where there is something to be done by the party asking for it, constituting a condition precedent, which he has deferred till, by the efflux of time, a material change of circumstances has been produced. It is no defence where two persons make a joint purchase of land, and a title bond is taken to one of them, who gives the other his bond for half of the land so soon as a legal title should be procured; for in such case the obligee has nothing to do, previously to his being invested with a right to performance.

In consideration of military services performed by Cornelius Drake, the State of North Carolina issued to him warrant, No. 404, for 571 acres of land, dated the 11th of September, 1784. This warrant, by an entry No. 370, in the office of the Surveyor of Military Lands, was immediately afterwards located "on the waters of Little Harpeth river, beginning at the south east corner of Ephraim Drake and Daniel Dunham's pre-emption, and running along the south side to their south-west corner; thence off at right angles for complement." On the 26th of October, 1788, Drake sold this warrant and location to John White, the ancestor of the defendants, and gave him a written transfer, and order to the Secretary of State of North Carolina for the patent; and also executed to him a bond, conditioned that if a patent for said land should come out in his name instead of White's, he, his heirs, &c. should convey it by a sufficient deed of bargain and sale to White, his heirs, &c., at his or their reasonable request after the issuance of the patent. White, then of Camden, North Carolina, sold one half of the tract to Joshua Campbell of the same place, and gave him his title bond, dated the 26th of July 1790, conditioned that when the patent should come out, and he should procure a right from Drake, he, White, or his heirs, should convey 285 acres of said land—respect being had to the quality—to Campbell or his heirs, at his or their reasonable request after the issuance of the patent

or the execution of a deed by Drake to him. On the 26th of January, 1791, the land was surveyed in the name of ^{Koen}White's Heirs. Drake, *beginning* at a red oak tree, running thence south, 268 poles, to a large ash and hackberry; thence west, 340 poles, to a stake; thence north, 268 poles, to the south-west corner of Daniel Dunham's pre-emption; thence with Dunham's line, east, 340 poles to the *beginning*. At April session, 1794, of Davidson County Court, the bond from White to Campbell was proved by Frederick Davis, one of the subscribing witnesses, and admitted to record. About the year 1790, both Campbell and White, who appeared to claim the land as partners, removed to Tennessee, and White took possession of it. Campbell returned to North Carolina, but left in the hands of Frederick Davis, his agent, White's bond for one half of the land. Davis called on White for a division, and he was willing to make it, but not in portions of equal value as Davis thought, and he declined it. Campbell died, and then Davis surrendered the bond to his representative, who afterwards made an attempt, through the agency of Levin Edney, to have a division, which attempt also failed for the same reason as the former.

On the 20th of May, 1808, the State of Tennessee issued a patent for the land in the name of Cornelius Drake. In the same, or the next year, Daniel Koen, complainant's father, went to North Carolina, and purchased from Campbell's heirs, their interest in the land, which interest was transferred to him by some instrument of writing, probably an assignment of the bond. He was in low circumstances, and having failed to procure a division of the tract, he went to the south on business about two years afterwards, and on his return in 1812, died intestate, leaving the complainant, Hardy Koen, his only child and heir at law—an infant. White's original bond to Campbell, if it had ever been in Koen's possession, seems to have been lost.

After the patent had been issued to Drake, White filed a bill in chancery against his heirs and representatives, for a specific execution of the contract for the sale of the land to him; and on the 15th of February, 1817, in the Supreme Court of Tennessee, he had a decree divesting the title out of them, and

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White's Heirs. vesting it in himself. The contingency had now happened upon which he was to make Campbell a deed for one half of the tract. About the month of May, 1825, White died, and in October following, the complainant came of age.

On the 7th of March, 1827, he filed his bill in the chancery court at Franklin, against White's heirs, praying for a specific performance of the contract between him and Campbell. He stated the loss of the original bond, but exhibited a copy of it obtained from the records of the County Court of Davidson.

The heirs of White answered, suggesting that the purchase from Campbell's heirs by Daniel Koen was invalid on account of the infancy of some, at least of those heirs; also, that the bond had not been lost, but White, in his life time, had taken it up from one McDaniel, who had purchased it from Koen, by paying him a grey mare and foal; but relying principally upon the statute of limitations, the lapse of time, and the length of White's possession, more than 30 years, before the institution of the suit. On the 5th of April 1833, an amended bill was filed against the heirs of Campbell, as to whom it was taken for confessed at October Term, 1836. Testimony was taken, particularly to establish the allegation, that White had, before his death, taken up the bond. Among his papers one much mutilated had been found, purporting to be a contract between him and Campbell about land, made while they were yet residing in Camden; but the date of it had been torn off, and what remained of it seemed to relate to a different tract. There was endorsed on it, under date of May 14th, 1816, a receipt, it seemed, of a *brown* mare and foal "in part of the within," &c. But it is unnecessary to repeat the evidence upon this point, as it was thought unsatisfactory by the court; and the foregoing narrative contains the substance of the pleadings and proofs.

The cause was heard at May Term, 1838, before his Honor Chancellor BRAMLITT, who, being of opinion that the complainant was entitled in equity to an undivided half of the land according to quantity and quality in its unimproved state; and to a reasonable rent for said one half from the filing of the bill, and interest thereon, accordingly appointed five commissioners, and in case they or any of them failed to act, the

Clerk and Master to appoint others in their stead, any three of whom were to lay off and set apart to the complainant one ^{Koen} half of the tract, according to quality and quantity, estimating ^{v.} White's Heirs. the whole according to its value in an unimproved state, and assigning to the heirs of White, the cleared and improved land, valuing it as unimproved. And the Clerk and Master was directed to take an account of the rent of the tract from the filing of the bill, charging White's heirs with reasonable rent and interest thereon. The complainant was ordered to pay the costs of the suit.

From this decree the defendants, White's heirs, appealed in error.

COOK and F. B. FOGG for complainant.

R. C. FOSTER, Jr. and MEIGS for defendants.

January 4, 5.

GREENE, J. delivered the opinion of the court.

John White executed a bond to Joshua Campbell, dated ^{January 10.} 26th July, 1790, to convey him the one half, according to quality and quantity, of a 571 acre tract of land on Harpeth river, being the service right of Cornelius Drake, so soon as a grant could be obtained for the same, and so soon as said White could procure a title thereto. Campbell died, and Daniel Koen obtained from his heirs an assignment of the bond on White. White obtained a title to the land from Drake, by a decree of the Supreme Court in 1817. Before this time Daniel Koen died, leaving the complainant his heir at law.

The complainant became of the age of 21 years in 1825, and this bill was filed the 7th of March, 1827, for a specific performance of the contract.

The defendants resist the decree sought by the bill upon several grounds.

It is objected, that there is no evidence that any consideration was given to Campbell's heirs, by Daniel Koen, without proof of which he cannot move the conscience of this court in his favor. It is true there is no direct proof of a consideration; but Campbell's heirs are made defendants to the bill, and having failed to answer, it was taken *pro confesso* against them. It is, therefore, to be treated as though they

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The payment of a consideration having been established, as between Campbell's heirs, and the complainant, the other defendants have no right to resist a decree on that ground.

It is objected, that this bill is not brought in time; and that the infancy of the complainant is no excuse; the circumstances of the parties and the value of the property having greatly changed.

It is true a great number of years have elapsed since this bond was given, but the ancestors of the defendant was not liable to be called on for the title, until he procured one from Drake. This he did not obtain, until in 1817, when it was decreed him by this court. At that time the father of the complainant was dead, and he was an infant, not having arrived at full age until 1825, about 18 months before the bill was brought.

The case of *Smith's Heirs vs. Christmas*, 7 Yerg. 565, and similar cases relied on by the counsel for the defendants, are very different from this. They are cases where time is of the essence of the contract; where something must be done by the party seeking a performance, precedent to his right to demand it. In such case, a complainant must show himself to have been "ready, willing and eager," to comply on his part.

But the case is wholly different, where, as here, two men are tenants in common of a tract of land, to which they have an equitable title, and one of them gives his bond to convey to his co-tenant the other half, so soon as he shall get the legal title. The party seeking the enforcement of the contract had no precedent condition to perform, the non-performance of which would embarrass and involve the other in difficulties and loss. The circumstances of the parties, therefore, can not be said to have changed so as to render it inequitable for the court to decree a performance.

It is insisted that the original title bond, of which a copy is exhibited in the bill, was in the hands of one McDaniel, from whom the ancestor of the defendants purchased it, by the pay-

ment of a grey mare and a foal, a watch and some money; and that said original bond was not lost as is alleged in the bill. Keon
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It is unnecessary to refer particularly to the evidence upon this point; it is contradictory, confused and inconclusive.

The bond upon which this credit is said to have been, is not sufficiently identified by the witness who speaks most certainly about it, to satisfy the court that it was the one for the land in question; and this evidence is much weakened by opposing facts and circumstances.

Besides, it is not even contended that the bond was assigned to McDaniel, or that he had any right to the land.

If, therefore, White obtained possession of it from him, for a consideration paid; the complainant's equity to the land would not be extinguished thereby.

We therefore think the complainant is entitled to the relief he seeks.

Let the decree be affirmed.

EWING vs. CANTRELL.

CHANCERY. *Ancillary jurisdiction—fraudulent conveyance.* The jurisdiction of chancery, under the statute against fraudulent conveyances—1801, c 25, § 2—being ancillary—namely—to remove impediments to executions at law, will be exercised only, where the impediment to be removed, affects things which might be reached by execution, but for the impediment: never, in any case, where the property sought to be made liable, in equity, could not be reached at law, even though no obstruction existed.

DEBTOR AND CREDITOR. *Statute of frauds avoids gifts of lands, &c. but not money, stock, choses in action, &c.* The statute of frauds avoids every gift, &c., of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, made of fraud, &c.; and, by construction, it embraces voluntary gifts, made by embarrassed men, though without intentional fraud, of lands, &c.; but not a gift of money, stock, choses in action, &c., so made; nor does the donee, by force of such gift and the statute become debtor to the donor's creditor.

SAME. *Chancery. Ancillary jurisdiction extended to money, stock, &c. by act of 1832.* There was no jurisdiction in chancery to subject a debtor's money, stock, choses in action, &c., to the satisfaction of judgments against him, whether in his own hands, or in those of his voluntary donee, till the act of 1832, c 11, which was produced by the doctrine held in the case of *Erwin vs. Oldham*, 6 Yer. 185.

William Wendle, on the 22d of July, 1833, by indenture conveyed, seven acres and sixty-five square poles of land in the vicinity of Nashville, to George M. D. Cantrell, for a nominal consideration paid by Cantrell, and for love and affection to Mrs. Juliet A. D. Cantrell, his sister, and the mother of G. M. D. Cantrell, in trust for the separate and exclusive use of Mrs. Cantrell during her natural life and no longer. And it was made the duty of the trustee to permit Mrs. Cantrell, during her life, to have, receive, and enjoy the use, occupation and possession of the premises, free from all claims, rights and demands of her husband, Stephen Cantrell, who was bankrupt: and upon her death, the premises were to revert to, and be revested in the grantor, &c., in as full and ample a manner as if the conveyance had never been made and executed.

Mrs. Cantrell had separate property, consisting of cash and bank stock, amounting to about 2500 dollars. Her son and trustee, during the year 1833, with her knowledge and consent, but "of his own accord," made improvements on the parcel of land above mentioned, consisting of a comfortable brick dwelling house, kitchen, smoke-house, offices,

&c. which were designed for his mother's use. The cost of these improvements was \$4,756 97 cents. Of this sum \$2,644 34 cts. was paid by means of Mrs. Cantrell's separate property, together with \$148 21 cents, advanced by Stephen Cantrell, her husband, leaving a balance of \$2,112 53 cents, which was paid by the trustee out of his own funds, and was intended by him as a present to his mother.

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He was then engaged in business in Nashville, as a partner in the firm of Cantrell and Allen, and he charged said sum of \$2,112 53 cents to his private account on the books of the firm. That house was then insolvent, though the fact, it seems, was unknown not only to Mrs. Cantrell, but even to her son himself, who believed it was worth 15000 or 25000 dollars over and above all demands against it. On the 10th of July, 1834, however, Cantrell and Allen made a deed of trust to Edwin H. Ewing, in favor of their creditors, who were divided into four classes, which were to be paid successively out of the fund provided in the deed, and that fund was described in part as consisting of "all their book accounts, a list of which will be made out and handed to said trustee, the books being now here assigned and delivered over to said trustee; all constable and lawyer's receipts,—and all other choses in action of what description soever they may be," &c. This deed was duly registered in Davidson county, on the 19th of July, 1834.

At September Term, 1834, of the circuit court of the United States for the district of West Tennessee, Warner & Bayard, of Philadelphia, obtained a judgment by confession against Cantrell and Allen for 1250 dollars debt, besides costs, upon which they sued out an execution, which was returned on the 19th of September, 1834, "no property to be found." And on the same day they filed their bill on the equity side of the circuit court of Davidson, against William Wendle, George M. D. Cantrell, Stephen Cantrell and Juliet A. D. Cantrell, to subject the aforesaid parcel of land and the improvements made upon it by G. M. D. Cantrell to the satisfaction of their judgment,—charging that the whole of said improvements had been made with the funds of Cantrell and Allen, and that G. M. D. Cantrell had purchased

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the land from Wendle, and that it had not been given by him to his sister, Mrs. Cantrell.

Chapron and Nidlett also recovered a judgment against Cantrell and Allen at the same term of the federal court, and also filed a bill, in that court for the same purpose as that of Warner and Bayard.

In this state of things, E. H. Ewing, the trustee in the above recited deed, on the 10th of December, 1834, filed his bill in the chancery court at Franklin, in behalf of the creditors of Cantrell and Allen provided for in that deed, against G. M. D. Cantrell, William Allen, William Wendle, Juliet A. D. Cantrell, Stephen Cantrell, Warner & Bayard, and Chapron & Nidlett, which he amended at October Term, 1836. The bill and amended bill charged, that Stephen Cantrell had reared his family as a man of wealth, but at the date of the conveyance by Wendle to G. M. D. Cantrell of the land in question, was entirely bankrupt; that the firm of Cantrell and Allen being in failing circumstances, the device was conceived and set on foot by the Cantrells to vest such an amount of money in real estate and buildings as would enable them to live according to their past habits of life, and yet so to secure the property as to place it entirely beyond the reach of the creditors as well of Stephen Cantrell as of his son, G. M. D. Cantrell; that in execution of this purpose, they procured Wendle to make the conveyance above mentioned; and G. M. D. Cantrell invested his funds in the improvements upon it, with a secret understanding that Mrs. Cantrell would reimburse him out of her separate property, &c. &c. The bill prayed for a discovery; that the land and improvements in question might be made liable to the debts mentioned in the deed of trust to the complainant; in favor of whom, it further prayed that a priority of satisfaction might be declared over Warner & Bayard and Chapron & Nidlett.

These several bills were answered; and the device and combination supposed in them were denied by the Cantrells; and they averred as also did Wendle, that the land had been conveyed to Mrs. Cantrell for the purposes and upon the consideration expressed in the deed itself; that the improvements had been made by G. M. D. Cantrell, with the know-

ledge and consent, indeed, of his mother, but in total ignorance, both on his and her part, of the embarrassed and bankrupt circumstances of his house, and with no design of defrauding its creditors; that these improvements were paid for as is above stated, partly with her separate property and partly with the funds of G. M. D. Cantrell.

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The cause was brought to hearing on the 30th of April, 1838, before his Honor, Chancellor BRAMLITT, upon the pleadings and proof, which latter simply established the debts claimed by the several parties interested, against Cantrell and Allen. His Honor was of opinion that the investment of the funds of Cantrell and Allen in the improvements above specified was without consideration, voluntary and void as to their creditors, and that the trustee, E. H. Ewing, was entitled to a priority over Warner & Bayard and Chapron & Nidlett. Whereupon he ordered the clerk and master to take an account of all the expenditures upon said lot, of the funds and effects of Cantrell and Allen, or either of them, charging interest thereon to the time of filing his report; that he also ascertain the unimproved value of the reversionary interest of Wendle in the lot, and report instantler.

The clerk and master reported that the sums advanced by Cantrell and Allen for the improvements, and interest to the first of May, 1838, amounted to \$2,661 78 cents; and that the reversionary interest of Wendle was worth 200 dollars, estimating the land as unimproved. An exception to the account was filed by Wendle as to the value of his interest. But his Honor confirmed the report, and decreed that unless \$2,661 78 cents were paid on behalf of Mrs. Cantrell, into the office of the clerk and master, in three months, he should sell the land and improvements at auction, for cash, and pay the complainant the \$2,661 78 cents, and interest thereon, to the date of the sale; and reserve the residue for Mrs. Cantrell and Wendle till further order.

The defendants all joined in an appeal in error.

COOK and EWING, for the trust creditors, insisted that it was scarcely credible that, during the progress of these improvements, none of the parties should have suspected the embarrassments of a house, which so soon afterwards proved

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to be utterly insolvent. But supposing the investment of G. M. D. Cantrell's funds in his mother's lands to have been made without her request, and in the absence of a contract to that effect, and in ignorance of his pecuniary condition, still the actual investment had been made, and the effect of it was the same upon his creditors, be the motives of the parties to it what they might. His money and effects, to which, as it has happened, his creditors have an undoubted equitable title, have been clearly traced, and now exist in the shape of houses, &c. upon his mother's land. Can that equitable title be defeated by the simple change of form which has been impressed, no odds with what motives, upon this money and these effects? If it can, it must be because some other person has acquired an equity in them superior to that of the creditors. But so far from Mrs. Cantrell or Wendle having an equity to claim this money, they have not even a formal legal title. For Mrs. Cantrell is clearly a debtor to her son for the amount invested by him in the improvements, since she acknowledges, that she knew he was making the investment. This being the fact, the action for money had and received, paid, laid out and expended will lie at his suit against her. Consequently, the demand is a chose in action of G. M. D. Cantrell, and comes within the very words of the deed to Ewing. How then are the creditors to be defeated? No possible reason can be assigned, but this, that, under a set of circumstances, which may indeed be supposed, but which this court will not run after, it may not be possible to make such dispositions as would comport with the nicest equity, to meet the just claims of all concerned.

Wendle has an interest in the land, depending on the life of his sister; she also has an interest in the land itself, and in the improvements, to the extent of her separate estate; and G. M. D. Cantrell, or his assignee, the present complainant, has an interest to the amount of his money or effects invested in the improvements. This latter interest cannot be made effectual but by a sale, unless Mrs. Cantrell or Wendle will refund the money. Where is the injustice or inequity of requiring them to do this? Will they not enjoy it, and have the exclusive advantage of it? And if they refuse,

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or are even unable to raise the money, what possible harm could they sustain, by bringing the property and improvements to sale? They would, in that event, be paid out of the proceeds in proportion to their respective interests. Wendle would be paid the value of his reversion; Mrs. Cantrell would be placed in *statu quo*; that is, she would be paid the value of her life interest in the land itself, and be reimbursed her separate estate; and the complainants come in for the residue. It may be said, it is inequitable to force a sale. Be it so. But is that at all comparable to the injustice of denying the creditors relief? Human affairs are but a system of compensations and balances at best. It is the system of providence; and we ought neither to pretend to greater wisdom in our feeble dispensations of justice, nor yet tremble to follow its lead, where its method is so clearly indicated.

WASHINGTON & F. B. FOGG, for the judgment creditors, argued that Ewing, the trustee, and the judgment creditors unite upon the same grounds, in resisting the defence set up by Mrs. Cantrell; and in maintaining, that her property is liable to the creditors of Cantrell & Allen, so far as its value was increased by means of the appropriation of their funds to that object.

But, as to the application of the proceeds of said property, when subjected, the trustee, and the judgment creditors are at variance with each other. The trustee contends, that said proceeds are embraced by the assignment which he holds. The creditors controvert that position, and insist, that said proceeds were not in the contemplation of the assignors, when they executed their assignment, and that, in fact, they did not pass thereby.

1. The firm of Cantrell & Allen, being very much indebted and embarrassed at the time when Cantrell made a voluntary investment of his funds for the benefit of his mother, such investment will be considered fraudulent and void, as against their creditors; *Reade v. Livingston*, 3 Johns. Ch. Rep. 492, 505; *Battersbee v. Farrington*, 1 Swanston, 113; *Beaumont v. Thorpe*, 1 Ves. Sen. 27.

2. The situation of the fund advanced by Cantrell, the debtor, as a donation to his mother, does not permit its being

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reached in equity, by his trust creditors; 4 Johns. Ch. Rep. 452, *Bayard v. Hoffman*; *Taylor v. Jones*, 2 Atkyns, 600; 4 Ves. 735. Mrs. Cantrell will not be injured by the complainants, as that which was her own, or the full value of it, is not interfered with. She knew of the expenditures made by her son, and did not forbid them.

3. The judgment creditors, by the exhibition of their bill, acquired a lien upon this fund, in preference to all creditors of Cantrell & Allen; if the fund was not included in the assignment to the trustee; *Spader v. Davis*. 5 Johns. Ch. Rep. 280; *McDermutt v. Strong*, 4 Johns. Ch. Rep, 687. The bill of the trustee is founded exclusively upon the deed of assignment. The object of the bill is, to carry that assignment into effect; and not to assert the rights, generally, of the creditors of Cantrell & Allen, as against the fund in question, upon the ground of its having been fraudulently diverted from their use. The question, therefore, under the bill of the trustee, and as between him and judgment creditors, is, as to whether the deed of assignment embraces the fund in controversy.

The deed of assignment does not embrace the fund in controversy. Nothing could pass by the deed of assignment, but what belonged to the assignors. The donation by Cantrell to his mother, fully divested him of all right to the subject matter of that donation, or to its proceeds. If the gift was not in fraud of his creditors, it was good as against him. If it was in fraud of his creditors, it was equally good between him and his mother. So that, in either case, when he executed the deed of assignment, he had no right to, or control over, the fund in question.

If Cantrell was guilty of a fraud, in making the donation, the right to the fund which was the subject matter of the donation, resulted to his creditors, in consequence of that fraudulent act; but, the fund did not revert to Cantrell himself.

It would, therefore, be absurd to say; that by the execution of the deed of assignment, Cantrell assigned, not that which belonged to himself, but that he assigned to his creditors what already belonged to them.

To sustain the claim of the trustee to this fund, under his

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bill, the court would have to say, in effect, that when the assignment was made, the assignor admitted, in making the assignment, that when he made the donation to his mother, he was guilty of an intentional fraud upon his creditors. If it was only a legal fraud, his creditors derived the same rights under it, by operation of law, that they did from the deed of assignment; and, therefore, there was no necessity for the assignment. The same would be the case, if it was actual or intentional fraud.

But, by putting the rights of the creditors under the operation of the deed of assignment, a positive injury is done them, to this extent. That, without the deed of assignment, they would all have an equal right to the fund, to be effectuated by each, according to the superior diligence which he might afterwards use; or by the whole, equally, by a joint proceeding to be instituted by them, for that purpose. But, if the fund could be passed by the deed of assignment, then, it would be in the power of the assignor, to prefer one creditor to another, as he actually has done in this instance, and put some in a better, and some in a worse situation, than they were placed by the law previously.

There is no evidence in this case, to warrant the assumption, that Cantrell was guilty of an intentional fraud, in making the donation to his mother; and he expressly and vehemently denies that he was. The act, therefore, that was done by him, ought to be left to its operation at law; and he ought not to be made to say, when he does not say it, that he was guilty of moral turpitude; and, therefore, he undertakes to convey a right which could not have any existence, upon any other hypothesis.

4. The term chose in action, does not, by any rational construction, as used in this deed of assignment, embrace the fund in controversy. The right to subject the fund, is an equitable chose in action, *belonging to the creditor*, and cast upon him by operation of law, in consequence of the commission of the fraud; but it is no *chose in action belonging to Cantrell*; because there is no action that he could maintain, either in law or equity, by which he could enforce it.

JAMES CAMPBELL for the defendant, said it is difficult to

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see how this case varies in principle from those of every day occurrence, where a tenant, or other person in possession of land, puts improvements upon it, by *no* contract with the landlord, or *not* at the request of the owner. A tenant or a trespasser improves the property of the owner, but not by virtue of any contract with the owner,—he must lose his improvements. He cannot make them a lien upon the land. *Townsend vs. Shipp's heirs*, Cook's Rep. 294; *Bristoe vs. Evans & McCampbell*, 2 Tennessee R. 341 and 352; *Weatherhead and Douglas vs. Bledsoe's heirs*, 2 Tenn. Reports, 392, 393.

How much stronger does the principle apply when lands, the separate property of a *feme covert* are to be affected? This court has decided in the case of *Morgan vs. Elam*, 4 Yerg. 375, that the power of a married woman over her separate estate does not extend beyond the meaning of the deed creating the estate; and she cannot, even with her own consent, charge her separate property, or create a lien upon it, even by contract, unless authorised by the deed to do so; yet it is contended by complainant's counsel, that although she cannot do so by contract, yet another person may do so, by no contract at all.

Complainant's case comes within the ancillary jurisdiction of this court. They have obtained their judgment at law, have run their execution, and it has been returned unsatisfied, or no property found. They now come here to ask a court of equity for aid in executing their judgment at law; to remove impediments that stand in the way of executing their judgment. They come here, as creditors, to set aside a fraudulent conveyance under the statute of the 13 Elizabeth, or act of 1801, which declares all conveyances made to defraud creditors, void. This statute confers no new jurisdiction upon this court, except to cancel sales and conveyances made to defraud creditors, and to subject the property conveyed to the plaintiff's execution.

If, then, the thing transferred be such that it is not liable to the plaintiff's execution, before the transfer, this court has no power to interpose and set the transfer aside, because your act would be perfectly nugatory. Suppose you do declare

the transfer void, what will it avail if you cannot subject the thing afterwards to the payment of the plaintiff's demand?

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Geo. M. D. Cantrell, an insolvent debtor, gives money to his mother. You may say that this gift was void, but then you cannot get hold of the money to subject it to the payment of the plaintiff's execution. If it had been property, and that property was still in existence, then by declaring the gift void, you render the property liable to the execution of the plaintiff. But, suppose the property is consumed or sold by the donee, and the money spent, and you cannot get hold of it, will the plaintiff's counsel pretend you can make the donee a debtor to the donor, and give judgment against him for the value of the property, and then subject that judgment to the payment of the plaintiff's execution? If you can, then a father who educates his son and gives him money to pay his expenses, makes his son a debtor to the amount of the money furnished, and the son can be made to pay the debts of the father to that extent. But no person pretends that this can be done. We all know, however, and admit, that if a father gives property to his son, and that property remain in specie, a court of chancery could declare the conveyance void, and subject the property to the payment of the judgment.

These principles clearly demonstrate that the complainant's bill cannot be sustained. Geo. M. D. Cantrell gave money to his mother. She took the money and made improvements on her land. No actual fraud was intended. The money has been spent. The mechanics who made the improvements have got it. The money cannot be reached by the creditors of Geo. M. D. Cantrell. Neither can you make Mrs. Cantrell a debtor to her son, for it was under no contract that the money was advanced, by which, in any event, she undertook to refund it.

REESE, J. delivered the opinion of the court.

Stephen Cantrell, being insolvent, Wendle, the brother of Mrs. Cantrell, conveyed to G. M. D. Cantrell, a tract of land near Nashville, containing about seven acres, in trust for the separate use and benefit of Mrs. Cantrell during her life,

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with reversion after the death of Mrs. Cantrell to the grantor and his heirs.

The trustee, G. M. D. Cantrell, was at the time of the conveyance, a member of a mercantile house, known by the style of Cantrell & Allen; and Mrs. Cantrell, the beneficiary in the deed of conveyance, had funds, her separate property, in the hands of Cantrell and Allen, amounting to about the sum of \$2500. With the funds, she desired a dwelling house and other improvements to be constructed, for her, upon the land conveyed to her by Wendle, her brother.

Her trustee and son, G. M. D. Cantrell, contracted for and superintended the construction of the dwelling house and other improvements. He projected the improvements upon a scale which required for their completion, the expenditure of about the sum of \$2500, in addition to the separate funds of the mother. This amount was furnished by him from the funds of Cantrell & Allen. It appears from his answer and that of Mrs. Cantrell, that the latter did not wish, or expect, or request, that he should expend any thing out of his own funds, or those of the firm; but that she expected and was willing, that the improvements should have been made by the exclusive application of her own separate means, and that neither he nor she knew or believed, during the time of the expenditure, that the house of Cantrell & Allen was in failing circumstances and verging towards bankruptcy. This, however, was the fact.

The question is, whether, under these circumstances, this voluntary and unsolicited investment, by the son, in improvements upon the separate real estate of the mother, can be reached, in her hands, by the creditors of Cantrell & Allen.

There is no pretence, that there was, in the transaction, any trust, secret or otherwise, between the mother and the son,—nor that it was intended to hinder and delay the creditors of Cantrell & Allen in the collection of their debts. It has been agreed that the answers shall be considered as depositions,—and they leave no ground upon which to impute *intentional* fraud to the parties. It is not pretended, that the transaction creates the relation of creditor and debtor between the

son and mother. Upon a principle, which has become an axiom, no one can be made a debtor in that way.

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But it is strenuously urged that Mrs. Cantrell, or her separate real estate, is liable to the creditors of Cantrell & Allen for the money so invested in improvements,—not because of any supposed lien created thereon, by the judgment and execution; but, because the advancement or gift by the son, he being an embarrassed man, is contrary to the principle and spirit of the statutes made for the prevention of frauds. Those statutes, indeed, make “void every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, whether by writing or otherwise, and every bond, suit, judgment or execution, made of fraud, malice, covin, or collusion to hinder, deceive, delay, &c.”

The principle of these statutes is, that the lands, goods, or chattels, so fraudulently given, or transferred, shall be liable, in the hands of the fraudulent donee or transferee, to the judgment and execution of the creditor of the fraudulent grantor. Thus, if an embarrassed debtor convey a tract of land to his son, not upon any trust, secret or otherwise, but for his advancement, and that it may be absolutely his,—a creditor of the grantor can, by operation of those statutes, render the land liable to the satisfaction of his debt. But if, before this be done, the land be fairly and honestly conveyed to another, for an adequate consideration, so that it cannot be reached by the creditor of the first grantor, will it be contended, that the son shall be held liable, as a trustee, to such creditor, for the proceeds of the land?

If *money be given* by an embarrassed man, to his relation or his friend, not *upon any secret trust*, to be implied from the circumstances, or otherwise—but absolutely, and for the benefit of the donee,—it would be difficult to say, that the donee, by the transaction, and by operation of the statute, becomes debtor to the creditor of the donor. Lord Northington, indeed, in the case of *Partridge v. Gopp*, Ambler, 596, *argues* in behalf of such a consequence, although he does not so *decide*. The case was one in which an executor had given away the trust fund to his children, and that circumstance, if they had not

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been legatees, under the will, (upon which ground they were held not to be liable,) might, perhaps, have justified the court in affecting them with a trust. But the intimation of Lord Northington, in that case, is not consistent with the case of *Dundas v Dutens*, 1 Ves. Jr. 196; *Calander v. Edwick*, 1 Ans. 381, and *McCarthy v. Goold*, 1 Ball & Beat. 387; see, also, 9 Ves. 189; 10 Ves. 368, and the case of *Erwin v. Oldham*, in this court, 6 Yer. 185.

The principle of these cases is, that the jurisdiction of courts of chancery, in cases arising under the statute, is ancillary to that of the common law courts, and for the purpose of giving effect to the lien of the creditors, judgment and *fi. fa.*

In consequence of the decision of this court, just referred to,* the act of 1832, c. 11, was passed to subject stock, choses in action, &c., to the satisfaction of the claims of creditors. If the positions, by which the decree of the Chancellor, made in the present case, is attempted to be sustained be correct, that case was improperly decided, and the act of assembly produced by the decision, was unnecessary. For they both proceeded upon the ground, that where the execution created no lien, the ancillary jurisdiction of chancery could not be successfully invoked.

It would follow, from the view which we have taken, that if Cantrell the son, had, without any trust, secret or otherwise, proved or to be implied, given to his mother the money in question, to be hers absolutely, she could not be treated, as personally the debtor of the son's creditors. If this be so, when the son, without any secret trust or intentional fraud, mingles his funds with hers, and invests them in improvements upon her real estate, it follows, *a fortiori*, we think, that the creditors cannot treat her, or her land, as being liable to them. Upon what principle shall this be done? Their judgment creates no lien upon her separate real estate, nor their *fi. fa.*, upon the funds invested; nor is she debtor to her son.

It is said, however, that if Mrs. Cantrell, or her separate property cannot be rendered liable for the amount of the funds

* See NOTE at the end of the case.

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of her son, which have been invested, it will follow, that an embarrassed man, with large money resources might build a valuable factory upon a piece of land, the property of a friend, of inconsiderable value, and bid defiance to his creditors; or, that a fraudulent father might incorporate a jewel, worth many thousand dollars, with the watch of his daughter, and elude the payment of his debts.

The cases put are of a character to make the friend and daughter participators in actual fraud. The very circumstances would incontestably prove the existence of a trust,—and we imagine they would be treated accordingly. But what would be the practical operation of the principle contended for in a variety of cases? What its operation, in a case very common in this country? A father, possessed of a large real estate, settles upon it several of his sons, intending, perhaps, if they properly conduct themselves, that it shall be theirs. They build handsome houses and make valuable improvements, and become insolvent,—what shall the creditors sell to satisfy their debts? The houses only, or land also? And if land, how much, and how shall it be laid off? And for what shall the father, the owner of the land, be held liable in the account between him and the creditors of the sons? For ameliorations only, or for the actual amount of investments and the costs of the improvements?

The same difficulty would arise between the creditors of a dowress and the heir; between those of the lessee and the landlord. In the case before us, what would the creditors sell? The house, or the house and the land also? Why the land? because it is but seven acres! Ought it not, on the same grounds, to be sold if it consisted of seven hundred acres? And how should the reversioner, Wendle, be treated? Shall his interest, too, be disposed of?

Whether, therefore, we consider this case, in one aspect or the other; as it regards the rights of the complainant and the jurisdiction of the court, or the impossibility of giving any relief which would not operate with gross injustice upon the title and property of Mrs. Cantrell; we are alike satisfied that the decree should be reversed and the bill be dismissed.

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NOTE. The case of *Erwin v. Oldham*, was argued in March, 1832, and continued under advisement, and for re-argument, till March, 1834, when the chancellor's decree was affirmed. It is reported as of March Term, 1834, when the opinion was delivered; but the decision of the Chancery Court, and the opinion intimated by the Supreme Court, on the argument, produced the act of 1832, which was passed on the 18th of October. See Minutes of the Court, March, 1832, p. 246, and March, 1834, p. 96.

In the case of *Donovan v. Finn*, 1 Hopkins 59, the chancellor said, "The cases, of authority, in which relief has been given to judgment creditors, were, in themselves, cases of equitable jurisdiction, involving fraud or trust, or seeking to subject to the satisfaction of the judgment, property in itself, liable to execution, by removing a conveyance, which operated as a fraudulent impediment to the execution." This doctrine, it is probable, produced the New-York statute of 1828, R. S. 173, 174, § 38, 39, from which our act of 1832 is almost a literal copy. See *McElwain v. Willis*, 9 Wendell, 548.

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DOWER. *What is a bar to dower—testamentary provision—election—1784 c. 22, § 8.*—At common law, a widow was not put to her election between a testamentary provision and her dower, unless such provision was made expressly or by necessary implication, in lien, or satisfaction of dower. But by the act of 1784, any provision for the wife in the husband's will, either out of real or personal estate, puts her to her election, which must be made within six months after the probate of the will, or she will be bound by its provisions.*

About the year 1822, James M. Banks intermarried with Louisiana D. Cash. In October of that year, her father gave her several negroes, and at his death, a tract of land, in Williamson county, of 512 acres descended from him to her and her brother. Banks purchased from her brother his interest in the land; and added to it 800 or 900 acres more. About the last of June, 1835, Banks died, seized and possessed of this and other property. He made and published his last will and testament on the 4th of June 1835. In it, after making a variety of provisions for the payment of his debts, and support of his family, which consisted of his wife and six infant children, all of which provisions were designed to preserve his property entire until his children should arrive at their ages of 21 years, he made the following provision for his wife, which was to take effect after the payment of his debts.

"I give and devise unto my wife, Louisiana D., such part of the tract of land which descended from Thomas Cash de-

* See the NOTE at the end of the case, where the alterations made in the common law on the subject of dower, by the St. of 3 and 4 Wm. 4, c. 105, are stated.

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ceased, as I am entitled to in right of my said wife, to hold to her heirs and assigns forever. I also give and bequeath to my wife, Louisiana D., 1-7th part of all my personal estate, that shall remain after the payment of all my just debts, and the necessary expenses of the execution of this my will, until the payment of said debts: to have and to hold the same, to her, her heirs, executors, administrators and assigns for ever. Which land and personal estate shall be set apart to her as soon as my debts are paid as aforesaid. And in case there shall be a deficiency of timber or wood on the part of land so set apart to her, I do hereby will that she shall, during her natural life, be entitled to necessary timber or wood upon any of my lands adjoining the part so set apart to her. Then followed a devise of all his remaining property to his children." The persons appointed executors of this will, renounced, and David Campbell, the defendant, was appointed by the county court of Williamson, administrator with the will annexed.

After his death, his wife intermarried with Thomas M. Reid, having first made an agreement in writing with him, that she should have and hold her estate, real and personal, and the rents, profits and proceeds thereof to her own separate use and disposal free from the control or liabilities of her husband. After the marriage, Reid executed a deed of conveyance and release, vesting her with a full right to all her said property to her separate use.

Campbell, the administrator with the will annexed, proceeded in its execution, until the 26th of April, 1838, when Mrs. Reid filed her bill in the Chancery Court at Franklin, against him, and her husband, Reid, and her children, to have her half of the land which descended from her father, assigned to her by metes and bounds; claiming dower of her husband's real estate; a child's portion of his personalty, all the negroes given her by her father after the marriage with Banks, as to which, she alleged that, by deed, dated the 27th of October, 1822, her father had conveyed them to her and her issue for their own proper use and benefit, which deed, she said, was found among the valuable papers of her husband, Banks, after his death; and she also claimed rents of her real estate and of the dower, which she prayed might be assigned her. And she called in question the proceedings of the ad-

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ministrator with the will annexed, and prayed that his powers and duties might be declared by the court, &c.

Campbell filed his answer on the 21st of August, 1838, in which he entered into a detail of his administration; and he insisted that the complainant knew of the probate of the will at October session, 1835, of Williamson county court, and of his appointment as administrator, with the will annexed, at the January Session, 1836; and that she did not, within six months thereafter, notify her dissent to said will, but acquiesced therein, and in his administration thereof. He further insisted that the bequests in the will were intended by the testator to be in lieu and satisfaction of her right of dower in his real estate, and in compensation for the use of her land, and the hire of her negroes, if she was entitled thereto; to which bequests, he alleged, she had assented, and acquiesced in them, by delivering him possession of said land and negroes, and never setting up any claim thereto, but always admitting that whatever rights she might have in the estate of her husband, she had under and by virtue of his said will.

The surviving children, one of them having died, filed their answer on the 23d of October, 1838, by Richard Alexander, their guardian *ad litem*, in which they adopted and relied upon Campbell's answer as to the claims of the complainant; and they prayed that the trusts of the will might be declared by the court, &c.

The cause was heard by Chancellor BRAMLITT on the 16th of November, 1838. His Honor was of opinion that the testator had made "no provision in his will for the complainant *in lieu* of dower, and that there was no provision in his will *inconsistent* with her claim of dower." He therefore decreed to her dower in his real estate, a child's part of his personalty, rent of her dower, and of her own land; and appointed commissioners to assign the dower and to make division of the 512 acres of land descended from her father, between her and her children, and assign her in severalty one half of it in value; and the Clerk and Master was directed to take the necessary accounts to make this arrangement of the property.

The defendants appealed to this court. Here, as in the chancery court, the debate and decision turned upon the con-

struction of the act of 1784, c 22, § 8, the question being—whether when a testator makes *no* provision *at all* in his will for his widow; or no provision *in lieu* of dower, she is obliged to enter her dissent to the will in order to have the benefit of the allowance made by law in case of intestacy? Or whether she is only bound to enter her dissent in case *some* provision is made, but which is unsatisfactory?

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Cook, for the complainant, said—It is admitted the personal estate is amply sufficient for the payment of debts, and the complainant does not seek to charge the administrator personally, but to have her real estate exonerated, and her dower assigned her. The widow did not dissent from the will within 6 months, as required by the act of 1784, and the first question is, has she a right of dower?

January 3.

There is no express bar of dower in the will, and nothing is given the wife *in lieu* thereof; therefore, we contend she is entitled to her dower.

The widow's right of dower is a common law right, and is not to be taken from her but by express words or necessary implication,—by giving something *in lieu* of dower, or making a disposition of the lands wholly inconsistent with the dower right. By the common law the wife was entitled to dower in all the lands of which her husband was seized during coverture. By the act of 1784, she only is entitled to dower of all the lands of which her husband dies seized.

How does her right to dower stand since the act of 1784? Does she derive her dower right under that act?

It is believed not. That act, though it professes to make a more ample provision for widows, actually abridges that right; since, instead of allowing the right to prevail as to all the lands of which her husband was seized during coverture, it confines it to those of which he died seized. As to these latter lands her rights stand as they did before the passage of the act of 1784. They rest upon the common law right. It is a right paramount to the right of the husband. He cannot defeat her of it, neither is it liable to his debts. She does not claim under him, but paramount to him, by the valuable consideration of marriage. 4 Yerg. 218.

'This being the widow's right, it is never to be intended

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that the husband, in the disposition of his estate, intends to interfere with it. All his dispositions are supposed to be subordinate to it. He is not to be supposed as intending to dispose of that which does not belong to him. A devise then, of all his lands to his children, or others, is to be construed, his interest in the lands, such as he has a right to devise; and is to be taken subject to the dower of his wife, which was her property, and to which he had no right of disposition.

This is the settled law in England and America. Clancy on Rights, 232-3-4, and cases there referred to, Roper on Property, 555, 558; *Blount vs. Gee*, 5 Call, 481; *Adsit vs. Adsit*, 2 John's Ch. Rep. 9; *Smith vs. Kniskern*, 4 Johns. C. R. 9; Barbour & Harrington's Dig. 439, 440; *Wood vs. Wood*, 5 Paige's Ch. Rep.; 1 Cox 447, Dick. 655; 2 Sch. & Lef. 452; 2 Vern. 581; Pre. in Ch. 133.

This being the law before, what effect has the act of 1764, requiring the widow's dissent, on her dower right?

We contend that act only applies to a case where the widow would, before, have been put to her election; to a case where the testator had expressly, or by necessary implication, undertaken to dispose of her dower. Then if she does not dissent within six months, her dower right passes by the will.

Her failure to dissent is a statutory election to claim under the will, and claiming under it, she must give effect to all its provisions. But whenever she may claim under the will, and yet claim her dower; or, in other words, where no case of election is raised by the will, she need not enter her dissent to the will. She need not, because she assents to the will; the provision in the will being not inconsistent with the right of dower, she is entitled to it also.

The two claims being consistent and not at variance with each other, why should she dissent? She is satisfied with the provisions of the will, seeing that all the provisions therein are intended, by her husband, as personal bounties, and he has not attempted to dispose of, or interfere with, her dower. This is the view the Supreme Court of North Carolina has taken of this subject.

2. The administrator, with the will annexed, cannot execute

the trusts of the will. They are personal confidences. 16 Ves. 27; Sugden on Powers 179, 4th Ed.; 1 Williams on Exr. 574; 2 Id. 628.

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3. The wife's estate is only secondarily charged; and she has a right to have the general personal estate applied to the payment of the debts, and as that fund is sufficient she is entitled to have the rents of her lands refunded to her. 2 Ves. Jr. 328 note; 4 Ves. 816; 3 Ves. 117; 4 Ves. 76, 82; 9 Ves. 447, 453; 11 Ves. 179, 186-7; 4 Des. Ch. Rep. 329; 4 Mad. Red. 69, 96; 5 Ves. 500; 2 Williams on Exrs. 1048, 1050; 3 John's C. R. 412-5-6; 227; 2 John's Ch. Rep. 614.

January 4.

DAVID CAMPBELL, the administrator with the will annexed, for the defendants, said that the case presented, for decision, two questions.

1. Whether a widow, who has failed to enter her dissent to the will of her husband, within six months of the time when it was admitted to probate, as prescribed by the statute, can, after the lapse of that period, dissent from it, and claim dower in his real estate?

2. Whether she was not, in the case before the court, bound to elect between her dower, and the provisions made for her in the will,—and whether she has not determined her election by excepting that provision; or, whether she can claim both her dower, and the bequests for her benefit?

Upon these points he presented to the court, a very elaborate written argument.

1. He admitted that, at common law, dower cannot be barred but by an express provision in lieu of it; nor, under the st. of 27 H. 8, c. 10, but by a jointure made in pursuance of the provisions of that law; and that to put a widow to election between a testamentary provision made at common law, and her legal provision, it must be manifest from the context of the will, that the testator intended the testamentary provision to be in lieu of dower. He cited, upon this first branch of the subject, 1 Haywood, 244; 1 Roper on Property, 457; Co. Lit. 36, b.; 1 Roper, c. 10; 10 Yerges, 94; 4 Rep. Vernon's case. But he contended that the act of 1784 did not require that the will must expressly declare the provision to be in lieu of dower. The only requisition was, that the

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provision should be *fully satisfactory* to the wife. She was made, he said, the sole guardian of her own rights, and the sole judge whether the provision is satisfactory, and such as she ought to accept, and wave the dower; or reject and take her dower. This statute was, he said, a repeal of the common law doctrine on the subject. For its express declaration is, that any provision, whether of real or personal estate, unless rejected by the widow, shall bar her dower. As to the manner of construing the statute, he cited 4 Bac. Ab. 645; 1 Keut's Comm. 431.

2. As to the second question—Whether the provisions of this will were such as could make a case of election, according to the principles of the law as settled in England and this country before the passage of the act of 1784, he cited 1 Roper on Property, 554, 555; Clancy on Rights, 231, 232; 1 Roper 456; 4 Co. 3; Dyer, 146; 1 Roper, 465, 482; 2 Ves. & Beames, 222; 4 Cond. Eng. Ch. R. 236; S. C. 1 Jac. 506; 5 Madd. 62, 64; 7 Cranch, 370; 1 Russell, 192. He said that the cases admitted of the following classification: 1. Those in which there was a bequest to the widow of a pecuniary legacy, personal annuity, or other interest, which only affected the personal estate. 2. A rent or annuity to her, issuing out of, or charged upon lands of which she was dowerable, with or without a power of entry or distress. 3. Similar benefits, or any other given her out of a mixed fund, composed of the real and personal estate of the testator, whose will devises his real estate to her and other persons as trustees, or to other persons alone for sale, and directs the proceeds shall form a part of his personal estate. 4. Annuity to be charged upon the real and personal estate. 5. A limitation to her in remainder of the estate in which she is entitled to dower. 1 Roper on Property, 555; Clancy on Rights, 230, 250; Roper on Legacies, 414, 425; 4 Ves. 349; 1 Ves. Senr. 230; 3 Atk. 433; 2 Ves. Jr. 572, 580; 2 Sch. & Lef. 444; 3 Bro. 347; 2 Id. 291; 6 Ves. 385; 2 Eden, 226; Amb. 466, S. C.; 1 Bro. C. C., 292 notes; Ambl. 730; 1 Ves. Jr. 335; 3 Bro. C. C. 255; 6 Ves. 216; 1 Russell, 129; 1 Sim. & Stur. 513; 1 Bro. C. C. 445; 2 Dick. 685; 4 Kent's Comm. 50, 3d Ed.

MARSHALL on the same side, said, that as the testator has made an express provision for his widow, the complainant by his last will, and she has not dissented from it within six months, the dower sued for in this case cannot be recovered. Acts 1784, c 22, § 8; *Croven vs. Croven*, 4 Dev. 338, *et seq.*

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2. But if wrong in this position, then, we contend that the complainant under this will was put to her election between the provision made for her in the will, and the provision made for her by law, and not having dissented from the will within the six months, she has elected to take under the will, and is barred from recovering the dower prayed for. Acts 1784, c 22, § 8; 4 Kent, L. 55; Roper on Property, c. 10, 455 to 518; 3 C. Eng. Ch. Rep. 354, *Roadley vs. Dixon*; Clancy on Rights, 230 to 250; 1 V. & B. 22, *Chalmers vs. Storie*; *Butcher vs. Kemp*, 5 Mad. Rep. 61; 7 Cranch, 370, *Herber vs. Wr.n.*

The position of the complainant is, that the act of 1784, c 22, § 8, by the words, "express provision for the wife out of the realty and personalty," &c. means nothing more than this, that the widow, when she was put to her election, by the law as it stood before that act, should elect under that act within six months; and that the complainant, not being put to her election under this will, between its provisions of and those of the law, by the law as it stood before the act, can still take the devises and bequests as a bounty, and her dower as a legal right, although she did not dissent from the will. It is submitted if this is not founded on a misconception of the objects and provisions of the act of 1784, of the intention of the testator, and of the law in relation to election in such cases.

TURLEY, J. delivered the opinion of the court.

This bill is filed by the complainant for an allotment of her dower out of the real estate of which her first husband James M. Banks died seized, Her right to this allotment depends upon the construction which is to be given to his will in connection with the act of 1784, c 22, § 8. January 16.

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James M. Banks died in 1835, leaving a last will and testament, by which he made provision for his wife, the complainant, out of his personal property, but not of his real, except so far as to her maintenance, until a division of his estate should be made, under the provisions of his will. The complainant never expressed any dissent from this will, until the time of filing this bill, which is more than six months after the probate of the will. And it is now contended,—

That inasmuch as by the law, before the passage of the act of 1784, c 22, § 8, the wife could not have been deprived of her dower in the lands of her husband, except by jointure before marriage, or by a provision for her in the will of her husband made expressly in bar of her dower, or which must from necessary construction be held to have been intended as such express provision,—she could not, by any provision for her, in a last will and testament be so barred, under the act of 1784, c 22, § 8, unless the provision were of such a character as to force her to an election, independent of the statute.

It is admitted that previous to the passage of the act of 1784, a provision for a wife in the will of the husband, did not necessarily conflict with her right of dower in the lands of her husband, unless there was a case of election under the will; and that until the election was made, her rights were not concluded. But it is contended, that since that time, *any* provision for the wife in the will of the husband necessarily constitutes a case of election, and that this election must be made within six months after the probate of the will.

This brings us to an examination of the statute, which so far as is necessary for present purposes, is in the words following, to wit: "*And whereas*, the dower allowed by law in lands for widows, in the present unimproved state of the country, is a very inadequate provision for the support of such widows, and it is highly just and reasonable that those, who by their prudence, economy and industry, have contributed to raise up an estate to their husbands should be entitled to share in it. *Be it therefore further enacted*, that if any person shall die intestate, or shall make his last will and testament, and not therein make any express provision for his

wife, by giving and devising unto her such part or parcel of of his real or personal estate, or to some other for her use, as shall be satisfactory to her, such widow may signify her dissent thereto, before the judges of the superior court, or in the court of the county wherein she resides, in open court within six months after the probate of said will, and then and in that case, she shall be entitled to dower," &c.

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In the construction of this statute, it is contended, that by the terms of its preamble, we must intend that it was designed to place widows in a better situation than they were before, and that we cannot do this, if we compel them to elect under a will, in all cases, in which a provision is made for them, and within six months; because, that previous to the passage of the law, the widow was endowable of all the lands of which her husband was seized during coverture; and because a devise of property to her did not necessarily deprive her of this right, or force her to an election.

At first blush, this argument has weight, but upon full consideration, it is well answered. 1—The preamble of a statute never is resorted to but in cases of doubtful construction. Is this such a case? We think not. Rights of every kind depend upon, and are regulated by the laws of the community; and of necessity therefore, they may be changed and modified as the community may think proper, and in this particular there is no one right more sacred than another.

By the provisions of the common law, a widow was endowable of all the lands of which her husband was seized during coverture. There is nothing in the nature of our institutions, which would prevent a total change as to this right; even so far as to deprive her of it altogether. But the change made by the act of 1784, c 22, § 8, is a modification of her rights as they existed at common law, not a deprivation of them. And this modification exists in the provision, that she shall be endowed of the lands of which her husband dies seized—instead of the common law provision, that she shall be endowed of the lands of which he was seized during coverture—provided he shall die intestate, or shall make his last will and testament, and not therein make any express provision for her which shall be satisfactory to her. But if

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a provision be made by will, she must express her dissent thereto, within six months after the death of her husband, if such provision be not satisfactory to her.

Then a widow is only entitled to dower, when her husband dies intestate, or shall have made an unsatisfactory provision for her in his will. But inasmuch as the power to dissent changes the whole operation of the will, and opens the estate both real and personal to her rights, it is provided, and we think upon wise principles, that she must elect to take under, or against, the will within six months after the probate of the will, a period of time before any division, or distribution of the estate has been made, so that persons claiming under the will may know what their rights are, and not to be harassed by the claims of the widow at any indefinite time after the death of the testator.

This is not denied, if there be a case of election under the will, but it is contended that the statute makes no case of election, which would not have been such before its passage.

We do not think so. Previous to the passage of this act, no devise either of real or personal property would compel a widow to elect, unless it were given expressly in bar of her dower, or under such circumstances, as by construction would be held to have been so intended; but by the statute it is provided, that a provision for her out of the real or personal estate of the husband shall of itself constitute a case of election, which must be made in six months after the probate of the will, or she shall be bound by its provisions.

This is the first time this court has been called upon to give a construction to this statute upon this point, but it has been elaborately examined by the Supreme Court of North Carolina, in the case of *Mary Craven vs. Peter Craven*, 4 Dev. 338, when it received the same construction now given to it. To the able opinion of Judge Gaston we give our full assent, and feel that we can add nothing to it in illustration of the principles therein contended for.

2. But if it were necessary to show that the widow's situation was improved by the passage of the act of 1784, it can be done. Previous thereto she had no fixed right to a

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portion of her husband's personal estate; and of consequence she never could receive it, unless he should die intestate or give it to her by will. As the statute says, in the then unimproved state of the country, the dower in land was a very inadequate provision, and to prevent her being thrown upon it entirely for her support, it provides, that she shall have a part of the personalty, of which her husband can no more deprive her, than he can of her dower in land, provided she take the steps for the protection of her rights required by law. This was a great and important change in favor of the widow, and well justified the restrictions imposed upon her by the statute. There is no hardship resulting from the change of the common law, and the endowing her only of the lands of which her husband dies seized, because she is protected against gifts in fraud of her dower; and if her husband wills his real estate, it is converted into personalty, of which she is entitled to her distributive share under the statute.

We cannot therefore see any just cause for the abuse which this law has received. It is plain and specific in its terms, and has, as it purports, ameliorated the situation of widows.

There can be then no reason for giving it the restrained construction contended for.

Being of the opinion then, that when provision is made for a wife in a will, she is bound to take under the will, and not against it, unless she dissent within six months after the probate, it follows, that the complainant is not entitled to the relief sought, inasmuch as she has not complied with the provision of the statute.

NOTE. "Prior to the reign of Charles 1, five, and until the passing of the act 3 and 4 Wm. 4, c. 105, four kinds of dower were known to the English law.

1. Dower at the common law.
2. Dower by custom.
3. Dower *ad ostium ecclesie*.
4. Dower *ex assensu patris*.
5. Dower *de la plus beale*.

This last was a mere consequence of tenure by knight's service, and was abolished by st. 12 C. 2, c. 24; and the 3d and 4th having long become obsolete, were finally abolished by the above statute of Wm. 4.

By the old law, dower attached upon the lands of which the husband was seized at any time during the marriage, and which a child of the husband might

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by possibility inherit; and they remained liable to dower in the hands of a purchaser, though various ingenious modes of conveyancing were contrived, which in some cases prevented the attaching of dower: but this liability was productive of great inconvenience, and frequently of injustice. The law too was inconsistent, for the wife was not dowable out of her husband's equitable estates, although the husband had his curtesy in those to which the wife was equitably entitled. To remedy these inconveniences, the statute above mentioned was passed, and its object may be stated to be, 1. to make equitable estates in possession liable to dower; 2, to take away the right to dower out of lands disposed of by the husband absolutely in his life or by will; 3. to enable the husband, by a simple declaration in a deed or will to give the right to dower.

Before the stat. 3 & 4 Wm. 4, c. 105, a fine or recovery by the husband and wife was the only mode by which a right to dower which had already attached could be barred, though, by means of a simple form of conveyance, a husband might have prevented the right to dower from arising at all upon lands purchased by him. By the above mentioned statute, it is provided that no woman shall be entitled to dower out of lands absolutely disposed of by her husband either in his life or by will, and that his debts and engagements shall be valid and effectual as against the rights of the widow to dower. And further, that any declaration by the husband either by deed or will, that the dower of his wife shall be subjected to any restrictions, or that she shall not have dower, shall be effectual. It is also provided, that a simple devise of real-estate to the wife by the husband shall, unless a contrary intention be expressed, operate in bar of her dower.

Most of these alterations, as indeed may be said of many others, which have recently been made in the English real property law, have long been established in the United States. An account of the various enactments and provisions in force in the different states respecting dower may be found in 4 Kent's *Commentaries*, 34—72." Penny Cyclopædia, Art. Dower; 1 Chitty's *General Pr.* 252.

THOMPSON vs. BRANCH.

CHANCERY. *Trust, how created—resulting or implied.* An unsealed written acknowledgment or memorandum by a party clothed with the legal title of land, that another is interested in it a certain number of acres, will not raise a trust to convey the quantity specified, without proof of a consideration paid to the party making the acknowledgment or memorandum. A trust cannot be implied, except upon a consideration proved.

The State of North Carolina, by patent, No. 855, granted to William Branch a tract of 5000 acres of land, situated in Bedford county. At his death, it descended to his heir at law, John Branch. At October term, 1794, of the court of pleas and quarter sessions, for Halifax county, North Carolina, Edward Crowell recovered a judgment against the administrator of William Branch for 500 pounds North Carolina curren-

cy. On the 29th of June, 1811, Crowell sued John Branch, *as heir* of William Branch, upon this judgment in the county court of Williamson county; and at October session afterwards, recovered judgment, by default, for \$1000 debt, and \$1015 damages, all of which he released except \$649 40. To have execution of this judgment, a *fi. fa.* was issued on the 21st of October, 1811, which the sheriff of Bedford levied on the 5th of December, on the land above mentioned; and returned the execution, with the levy endorsed, and that he had not time to advertise and sell. On the 21st of January, 1812, a *venditioni exponas* was issued, to which the sheriff made return that he had sold the land on the 21st of March, for \$100, to John Warren, to whom he made his deed on the 30th of April, 1812, which was proved in the county court of Bedford at December session, 1812, and registered in the Register's office there, on the 8th of March, 1813. Warren, by his deed of the 4th of July, 1815, conveyed this land to Joseph Branch. The deed was proved at April term, 1816, in Bedford circuit court, and registered on the 27th of May, 1816. Having lost this land by the interference of older claims, and being about to obtain a warrant to be located elsewhere, Joseph Branch executed the following writing to John Branch—“July 19th, 1820. It is understood between us, that John Branch is entitled to (12) twelve hundred acres of the warrant that is to be drawn, or the land when located,—subject, nevertheless, to the locator's part to be taken from it, when ascertained and surveyed,—out of the grant granted to William Branch, after said John Branch pays his proportionable part of the expenses of said land.” Signed—“Joseph Branch.”

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On the 2d of September, 1820, Joseph Branch, being at his residence in North Carolina, wrote to John Branch, advising him that he had that day, received a letter from H. H. informing him that he had drawn his warrants, but that a person, who had a demand against him, had threatened to stop them in H's hands by injunction, in order to subject them to that demand. He then remarks that he, John Branch, was acquainted with the particulars of the demand, and his evidence would be important; and in order to preserve the full weight of his evidence, he had better not let any person know that he

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was *interested* in the warrants. He then continues—"I will be out, immediately after the locating takes place, and think you and myself can make a trade, so as for you to take the 640 acre warrant, I have got, for *your interest* in the same warrant."

In 1820, or 1821, Joseph Branch obtained grants for the lands which were entered in lieu of the 5000 acres lost. On the 4th of June, 1823, John Branch, for the consideration of one thousand dollars, assigned, by an endorsement on the above quoted memorandum, all his right, title and interest therein to Jason Thompson.

Joseph Branch died in 1827 without making Thompson a title to the lands mentioned in the memorandum, having devised his real estate to his minor children; and on the 10th of October, 1828, Thompson filed his bill in the chancery court at Franklin against Joseph Branch's heirs and personal representatives and John Branch, praying for a specific execution of the contract evidenced by said memorandum. Before the trial, Thompson died, and the bill was revived in the names of his devisees and heirs.

The defendants, in their answers, declined admitting that any consideration had passed from John to Joseph Branch for the land mentioned in the paper of the 19th of July, 1820; and they called upon the complainants for proof; and in the absence of such proof, they insisted that a court of equity would not execute the contract implied therein, divesting them of title to 1200 acres of the land, and vesting it in complainants.

No proof of any consideration was adduced by the complainants.

On the hearing, on the 16th of November, 1838, his Honor Chancellor BRAMLITT, dismissed the bill; and the complainants appealed in error.

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COOK & MEIGS, for the complainants, insisted that it was not necessary in this case, as in ordinary cases, to prove a consideration. The paper itself acknowledges that John Branch was interested in the land granted to William Branch, his father. True, the land had been sold for a debt of William Branch; but it had been purchased for a trifle, and sold

to Joseph Branch for a sum far less than its value; and the *interest* which was acknowledged to be in John Branch might have been founded on an agreement that if he would not disturb the proceedings under which the land had been sold, and which they alleged were irregular, Joseph Branch would convey to him some portion of the tract. However this might be, Joseph Branch's letter, they said, was a deliberate acknowledgment, confirmatory of that contained in the paper sought to be set up by the bill; that John Branch had an interest in the warrants which had been drawn by Joseph Branch. It could not be necessary to prove a consideration to sustain an undertaking to convey a part of a tract of land, by one of two persons to another, when both of them are acknowledging each other as jointly interested in the land, previous to the issuance of the first muniment of title. Such an acknowledgment, they insisted, was evidence that they both contributed the means whereby the property had been procured and consequently were at least equitable tenants in common.

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F. B. FOGG & MARSHALL, for the defendants, insisted that there being no proof of any consideration, and the paper itself not implying any, there was no principle upon which the court could be called upon to set up the instrument and give the complainants a specific execution of it. They cited *Coleman v. Sarrell*, 1 Ves. Jr. 50, 54, 55.

GREEN, J., delivered the opinion of the court.

The only question in this case is, whether the court can divest the title to the land in controversy, out of the defendants January 16. without proof that their ancestor received a valuable consideration therefor.

It is admitted that in ordinary cases, where one enters into an obligation to convey land to another, such contract will not be enforced in equity, but upon proof of the payment of a consideration: but it is insisted that this case does not depend upon the same principle.

The instrument upon which the complainants' claim is founded, is in the following words: "July 19, 1820. It is understood between us, that John Branch is entitled to (12) twelve hundred acres of warrant, that is to be drawn, or the land

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when located, (subject nevertheless to the locator's part, to be taken from it when ascertained and surveyed,) out of the grant, granted to William Branch, after said John Branch pays his proportionable part of the expenses of said land.

Joseph Branch."

As it is stated in this memorandum that John Branch is "entitled to twelve hundred acres," it is argued, that we are to infer that he did not derive his right from Joseph Branch, and consequently no consideration need be proved.

We cannot recognize the principle contended for. The legal title was in Joseph Branch. If he is forced to part with that legal title, it must be upon the ground that he holds it in trust for John Branch. But how can a trust be raised, except upon a consideration?

If the proof had shown that Joseph Branch and John Branch were tenants in common in equity, and that by some means, the legal title had been vested in Joseph, this would have raised a trust in favor of John, upon which the court could have acted. But there is no such proof in this case, and we cannot infer it from the use of the word "entitled" in this instrument. It must, therefore, rest upon the ordinary ground of an agreement to convey land; and no consideration having been proved, it cannot be enforced.

Let the decree, dismissing the bill, be affirmed.

GRAY vs. WILSON.

PLEADINGS—*joint contractor—joinder, &c.* All the joint owners of a fund must join in any action for its recovery; and each has a right to use the names of all in bringing and prosecuting the suit. Therefore, though one be paid, he cannot, without the consent of all, withdraw his name or dismiss the suit, even as to himself, and if he be permitted to do it by the court, it is error, because it defeats the action of which neither owner of the fund has exclusive control, having, therein no separate interest.

About three weeks before the Nashville races in the fall of 1837, Samuel Wilson made a bet of \$100 with John Carson upon a race to be run by certain horses. On the day of the race, Thomas Davis and Henry T. Gray agreed to be-

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come jointly and equally interested in the bet; and each of them placed in his hands \$ 33 33 $\frac{1}{4}$ as their shares of it; whereupon he deposited \$ 100 in the hands of Samuel D. Wilson as stakeholder. The horse bet upon by S. Wilson and Gray and Davis, owing, as they said, to some unfairness in the starting, did not run; and they directed the stakeholder not to pay the money to Carson; and on the 7th November, 1837, they joined in an action of *assumpsit* against him for the money, in the circuit court of Williamson, and declared for money had and received. The defendant pleaded *non-assumpsit* and *non-assumpsit* within three years, and issues were thereupon joined.

The suit being in this state, in July, 1838, Samuel Wilson one of the plaintiffs, took from James H. Wilson his two notes payable to himself, expressing on their face that they were given for the shares of the plaintiffs respectively in the money deposited with the defendant; and in consideration of said notes he agreed to dismiss the suit and pay the costs. He informed Gray of this arrangement, and offered him the smaller of the notes, which was \$37, for his part of the money sued for; but Gray refused to receive it.

At July term of the court, Samuel Wilson, in pursuance of said agreement, moved the court, ANDERSON, J., presiding, to enter a *nolle prosequi*; and the court thereupon made the following entry on the record; "It is considered by the court, that said suit be dismissed as to him, the said Samuel Wilson. The judgment of the court in dismissing is without prejudice or injury affecting the rights of the other plaintiffs; and that the said suit stand in the same plight and condition as to them as it heretofore stood."

At November term, the defendant pleaded, by leave of the court, *accord and satisfaction*; and there was a replication, and issue joined. The cause was then tried before Judge MARCHBANKS and a jury of Williamson. On the trial the facts here stated appeared in evidence.

His Honor stated to the jury, that Samuel Wilson and Gray & Davis were partners in the money deposited as a wager in the hands of the defendant; that the right of action to recover it was joint; that Gray & Davis, without joining Samuel

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Wilson with them as a plaintiff, could not recover their part of the money staked; that after the dismissal of the suit as to Samuel Wilson, it stood in the same condition as if he had not joined in the institution of the suit.

The jury returned a verdict for the defendant; and a motion for a new trial being refused, Gray & Davis appealed in error.

ALEXANDER, for the plaintiffs, said; we insist, 1. That this was a joint cause of action, and Gray & Davis had a right to use the name of Wilson in recovering their demand even against his consent, as they could not sue or maintain the suit without his name; *Wright vs. McLemore*, 10 Yer. 235. And this doctrine applies as well to joint parol contracts as to specialties; 1 Saund. R. 154, n; 1 Chit. Pl. 8, 9; *Chambers vs. Donaldson*, 9 East 471. These authorities show that the opinion of Judge ANDERSON was wrong in dismissing the suit as to Wilson.

2. But the opinion of Judge MARCHBANKS was wrong; because although it be true, we were obliged to bring the suit originally in the name of all three, as they were partners, or joint owners of the \$100; yet after the suit had been brought, the court had it completely under its control, and had a discretionary power to dismiss it as to Wilson, on his application. The error of Judge ANDERSON was in believing he was compelled to dismiss it. This discretionary power having been exercised in favor of dismissal, and every care taken in the entry to prevent its injuriously affecting the other two plaintiffs; the order should have been acted on by Judge MARCHBANKS, according to its words and intent. Instead of that, he charged against the order, and made the cause rest upon this; that if the jury believed the order Judge ANDERSON had made of record at a previous term, they must find for defendant; and the jury had no discretion; the merits of the cause which were certainly with the plaintiffs, were not left to them or acted on by them.

But it seems after a suit has been rightly brought, one plaintiff may be non-suited and the suit maintained as to the others; *Chamberlain vs. Prescott*, cited 1 Lord Ray. 380; and if this be the law, there is no reason why the present action cannot be maintained after the dismissal as to Wilson.

R. C. FOSTER, Jr. and MARSHALL, for the defendant.

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GREEN, J., delivered the opinion of the court.

There is error in the record in this case.

The hundred dollars deposited with Wilson the stakeholder, belonged jointly to Gray, Davis and Wilson, the original plaintiffs, there could, therefore, be no recovery except in the name of all these parties. Wilson had no right to compromise the suit, and dismiss it, without the consent of his co-plaintiffs.

If he had received satisfaction for his part of the amount claimed, still the other plaintiffs had a right to prosecute the suit in the name of all three, for their use.

Perhaps the court at the trial, might have construed the previous order dismissing the suit as to Wilson, so as not to affect the rights of Gray & Davis. If so, there was error in the judgment.

At any rate, there is error in the record, for which the judgment must be reversed and the cause remanded for another trial, in the name of all the original plaintiffs.

NOTE. *Joinder of Co-Contractors.*

1. *As Plaintiffs.* Comyn's Dig, Abatement, F. 12. Consequences of non-joinder, and how advantage is to be taken of the omission. Id. 12. 12.

2. *As Defendants.* Act of 1789, c. 57, § 5; *Administrators of Kenon*, 1 Haywood, 216; 4 Id. 152.

HARDEMAN vs. SHUMATE.

LANDLORD AND TENANT. *Lien on Crop.* Landlords, by the virtue of the "lien on the crop growing on the rented premises," given by the act of 1825, c 21, have no property in, or right to the crop, and can maintain no action grounded on any taking, or detaining of, or injury to it.

SAME. *Precedence of debt for rent, how secured.* The landlord's debt for rent is entitled to satisfaction out of the crop, growing, &c., precedent to all other debts of the tenant; and this precedence is preserved by bringing suit for the debt, within three months after the rent falls due, and prosecuting it to judgment,—the lien of which judgment, and the execution thereon, takes date from the day the rent fell due.

About the 1st of January, 1837, the plaintiff, Franklin Hardeman, rented thirty acres of cleared land to Isaac Potete, at two dollars per acre, to be paid on the 1st of January, 1838. Potete planted the land in corn, of which he made a crop of seventy barrels, and died intestate and insolvent in the fall of 1837. Administration on his estate was granted, by the county court of Williamson, to the defendant, William J. Shumate, on the first Monday of November, 1837. Shumate, in the character of administrator, though notified by the plaintiff not to sell the corn till the rent was paid, nevertheless sold it, in the month of November, 1837, for about one hundred and twenty dollars.

On the 31st of March, 1838, the plaintiff sued Shumate in the circuit court of Williamson, not in his representative capacity, but in his own rights, and declared in case, laying the *gravamen* of his action in this, that the defendant by selling the crop whilst the lien thereon continued, but before any action to enforce it could be brought against him as administrator (he not being suable in that character till six months after his qualification,) had deprived the plaintiff of the benefit of the lien.

At the trial before Judge MARCHBANKS, at November Term, 1838, he charged the jury, that unless the plaintiff satisfied them by proof, that he had recovered judgment for the rent against Potete, or his administrator, in that character, he could not recover in this action. The jury returned a verdict for the defendant; and the court, having overruled the plaintiff's motion for a new trial, he appealed in error.

MARSHALL, for the plaintiff said, the plaintiff had a lien on the crop for the payment of his rent, by the act of 1825, c 21. By the act of the defendant complained of, he is deprived of his security for this debt. The insolvency of the tenant is shown to ascertain the extent of the damage done the plaintiff by the wrongful acts of the defendant, in depriving him of his security; and it is no objection, that no judgment was taken against the administrator in that character. 1. Because the gist of the action is the plaintiff's loss of his debt, by the defendant's tortious act; 2. Because the administrator, by the act of 1829, c 57, could not be sued in that character, for six months after his qualification, which six months embraced the three months immediately after the rent fell due, and the law would require the plaintiff to do an impossible thing.

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3. It is the administrator in his own right who is sued, within the three months after the rent fell due, being the person against whom in his fiduciary character the judgment must be taken. And he is sued in his own right, because, having all the papers of the deceased, and knowledge of all the evidence, if any, going to show that the deceased never did owe the rent, or that he, or his representative had paid it, it would be competent for him to make proof, in this action, to show that the act of defendant was not tortious, or did not damage the plaintiff. And a judgment against him could not possibly injure him, for it is only the surplus of the crop, after discharging liens on it, that is assets in his hands; and it is only for that which is not assets that the plaintiff would recover.

4. If the act of 1829, c 57, had not stood in the way, and the act of 1833, c 31, had never been passed, still if the plaintiff had sued the defendant as administrator, on the unliquidated account for the rent, the defendant might have pleaded *plene administravit*, or outstanding debts of higher dignity, and the only judgment he could get would be of assets, *quando, &c.*, upon which he could sue out no *fi. fa.* It is true that this would ascertain the claim, but when the claim is ascertained by a suit between the same parties wherein all proof on this question is as competent in the one form as in

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the other, the one is as likely to be right as the other; and it would be worse than useless to put the plaintiff and defendant to the costs of two suits when one would settle the dispute as well, and in precisely the same way.

5. Because, under the act of 1833, c 36, the administrator, or any creditor of the deceased might have suggested the insolvency of the estate, before the rent fell due, and no judgment of any kind could have been obtained by the plaintiff, even if the act of 1829, c 57, had been out of the way. The plaintiff in order to have benefit of a legal right will not be required to do an impossible thing.

6. Because a judgment by the plaintiff against the administrator *quondo*, would be of no service to him, he could take out no *fi. fa.* on it, to seize the crop, or give him a perfect lien, in order to have recourse over against a stranger, if the defendant is to be looked on as a stranger.

The case of *Ballantine vs. Greer*, 6 Yer. 267, was an action of *assumpsit* by the heirs of the landlord against the assignee of a ginners' receipt for cotton supposed to have been raised on the rented premises. The tenant was alive, and was passed, and the assignee sued in an action, in form *ex contractu*, though a total stranger to the renting, or the dealings between the landlord and tenant, and without any privity whatever with the parties, except the fact of being assignee without notice. From the report of the case, it would seem, that it was an action barely for money had and received. If the point of the decision is apprehended, it is, that the landlord could not sue the assignee without a judgment against the tenant, because he could not take possession of the crop, if in the tenant's possession, without such judgment. This reasoning is specious, and possibly correct, in an action of *assumpsit*, if the lien under the act of assembly is understood to be inchoate and of no value, until a judgment is taken against the tenant, and perhaps a *fi. fa.*, (as the crop is personal property after it is gathered,) issued in order that the lien may be made a perfect lien, according to the doctrine in chancery, when a bill is fixed to subject equities to the payment of a legal demand. But however this may

bé, in such a case as *Ballantine vs. Greer*, it is insisted that the reasoning does not apply to the case before the court.

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This is a special action on the case against the administrator of the tenant, who is dead insolvent, and the defendant fully notified of all the facts, and forbid to do the act complained of; to wit: from converting and disposing to his own use, of property, in which the plaintiff was interested to a certain value, whereby the plaintiff was deprived of that interest; and to sustain this action it is wholly immaterial, whether he has the right of possession or not. It is sufficient that he has an interest, that he has been injured in, by the act of plaintiff, like the case of a reversioner against a stranger, who commits waste affecting the inheritance, whilst rightfully in the possession of a tenant for years. The reversioner may bring his action on the case for the damage done his inheritance against the stranger, although the reversioner had neither the possession of the thing wasted nor the right to the possession, and though the tenant for years might sue the same stranger in trespass for the same act, for the damage done the term; and so of many cases that might be mentioned. In the case before the court, the act of 1825 vests in the plaintiff an interest in the crop. The defendant has deprived him of that interest, and it is insisted that he ought to recover the damages consequent thereon.

ALEXANDER for the defendant, said—1. The plaintiff must allege and show to the jury that he has recovered a judgment against the tenant or his representative, or he cannot recover; *Ballantine v. Greer*, 6 Yer. 267.

2. The plaintiff has no lien on the crop until he recovers his judgment and gets execution; *Laurence v. Jenkins*, 7 Yer. 494.

3. The difficulty of being precluded by the acts of assembly from recovering a judgment against the administrator until the three months, and with it the lien for the rent would expire, must be remedied by the legislature, and not by the courts; *Cock & Jack v. McGinnis*, M. & Y. 361.

4. From the fact, that the landlord has no lien on the crop till he recovers his judgment, two things result: 1. That the crop raised on the rented premises, being personal property,

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went to the defendant as administrator of the tenant on the grant of letters of administration to him, and he was obliged to sell and treat the crop as assets, and he would be liable to creditors or distributees if he were to fail to do so. 2. The crop, in case the tenant was insolvent, being a part of his personal estate, must be distributed *pro rata* among all the creditors; and the plaintiff should file his claim and receive his dividend under the act of 1833, the contract having been forfeited, according to the doctrine, 7 Yer. 494, on the 1st January, 1838, after the sale of the crop by the administrator.

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GREENE, J. delivered the opinion of the court.

This is an action on the case to recover the sum due the plaintiff for the rent of thirty acres of land rented by him to Potete for the year, 1837.

In the fall of that year Potete died, and the defendant administered on his estate and sold the crop, that had been raised on the lands of plaintiff, knowing that the rent was unpaid. The suit was brought against the defendant in his individual character, and not as administrator of Potete.

The plaintiff insists that this case differs from the cases of *Ballantine v. Greer*, 6 Yer. Rep. 267, and *Lawrence v. Jenkins*, 7 Yer. Rep. 494, because those were actions of *assumpsit*, and this is an action on the case; and that although the act of 1825 would not give the landlord such a lien on the crop for the rent, that he might sue for, and recover the property, still it gives him such an interest in it, as that the appropriation of it by another, is such an injury to him, that case will lie.

We cannot perceive that there is any thing in the form of the action that will prevent the application of the cases, which have fixed a construction of the act of 1825, c. 21. If this act does not give to the landlord a specific lien upon the crop, so that he might recover in trover, for its conversion, but confers a mere priority of satisfaction,—the lien of his judgment and execution taking date from the day the rent falls due,—it follows that a conversion of the crop is not a wrong done to the landlord, for which case will lie; 7 Yer. Rep. 494.

The judgment must be affirmed.

NOTE. It is a misconception of the nature of the thing which has led to the suits, of which this case and the two reported in Yerger, are examples. No lien is such an interest as that for an injury to the property, to which it attaches, the party entitled to the lien may maintain an action. The several classes of persons mentioned by STORY—Bailments, § 440—have a lien, accompanied with possession of the thing, touching which the lien arises. Besides the *actual* possession, they have a *right* to possession, until the charge, attaching to the property is paid or discharged. STORY'S EQ. § 506. And for an amotion or deprivation of *such* possession, or for the abuse or damage of the thing, while the possession continues in any of those persons, they may maintain an action as well as the general owner. 2 Bl. Comm. 144, 145. But it is the possession and the injury to it not the lien, or any damage of which it is capable, which gives the action. There are some cases, besides that of landlords, of liens not accompanied with possession,—as the lien of a vender of real estate, the lien of judgment creditors, and perhaps others; and, in none of them, can the party entitled to the lien, maintain an action for an injury or damage to the property, to which the lien attaches. The landlord's lien gives him neither *jus in re* nor *jus ad rem*, neither a right in, nor to, the crop; but only a priority, which is of such an ideal nature, that it is not susceptible of injury by a conversion of the property, and can only be lost by the neglect of the landlord himself. And so of every other lien not accompanied by possession.

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KERCHEVAL vs. HARNEY.

BOND. *Performance or breach of condition*—1831, c. 25, of delivery bonds, apportionment of damages for breach of where several executions of the same tests are levied on the same property. An obligor cannot be held responsible for a breach of the condition of his bond, caused by legal constraint.

Thus, under the act of 1831, c. 25, which embraces delivery bonds taken after its passage, though founded upon executions issued before, if several writs of *fi. fa.* be levied on the same property, the obligors in a bond executed to the plaintiffs in one of them, conditioned to deliver the whole property, will be bound to deliver only so much of it as will be of value sufficient to satisfy the proportion of the execution of the obligees to which they would be entitled against the plaintiffs in the other executions.

The plaintiffs, Samuel Kercheval, Richard G. Scoggin and Andrew H. Ballantine, merchants of Pulaski, and partners under the name of Kercheval, Scoggin & Co., on the 2d of August, 1831, recovered a judgment for \$4409 50 cents in the circuit court of Giles against Lewis H. Brown as principal, and Robert B. Harney and John Hawkins, his sureties in an appeal in the cause from the county court. Upon this judgment, the plaintiffs sued out a *fi. fa.* on the 15th September, 1831, tested as of the preceeding August term,

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directed to the sheriff of Giles, by whom it was levied, on the 12th of December, 1831, upon eight negroes of the value of \$3444, the property of Brown. He proposed to replevy the property, which was done by his executing to the plaintiffs a bond with the defendants, Robert B. Harney, Edward D. Jones and James W. Eastham, as his sureties, of the same date as the levy, conditioned, in the event the execution should not be satisfied, for the delivery of the slaves to the sheriff on the 6th of February, 1832, at the court house in Pulaski, then and there to be sold to satisfy said execution.

Besides this execution there came to the hands of the sheriff of Giles several other executions against Brown, as follows: 1. One in the name of the Governor of the State, issued to have execution of a judgment obtained upon a forfeited delivery bond of the same slaves, issued on the 13th of January, 1832, tested the first day of November term, 1831, which came to the sheriff's hands on the 16th, and was levied on the same property on the 17th of February, 1832.— 2. One in the name of Robert Turner, founded also on a judgment obtained on a forfeited delivery bond of some of the same slaves, issued the 15th of February, 1832, tested the first Monday and levied on the 7th of February, 1832, on a slave Daniel, and on the 10th of April, on several of the first mentioned slaves. 3. One in the name of Paul J. Watkins, founded on a forfeited delivery bond of one of said slaves, issued the 17th; tested the first Monday of February, 1832, and levied on the day of its issuance on some household furniture of Brown. 4. One in the name of Ezra Webb & Co., issued on the 17th and tested the first Monday of February, 1832, and levied on the day of its issuance on the same slaves and others. 5. One in the name of John Laird, founded on a forfeited delivery bond of the same slaves, issued on the 17th, tested the first Monday of February, 1832, and levied on the day of its issuance on the same slaves.

These executions were all founded upon judgments recovered in the circuit court of Giles. But besides these, six other executions founded upon judgments recovered against Brown in the county court of Giles, had come into the hands of the sheriff, upon which he sold the negroes in question on the 9th

and 20th of May, 1832; and the proceeds, amounting to \$3,909 50, were applied towards these latter in exclusion of the circuit court executions.

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The delivery bond executed to the plaintiffs was of course forfeited, and on the 2d of November, 1835, the plaintiffs sued the defendants upon the bond in the circuit court of Giles. Pleadings were filed, but the cause was submitted to his Honor Judge ANDERSON sitting for Judge DILLAHUNTRY, at June term, 1838, upon an agreed case, of which the above facts are the substance; and if the law should be for the plaintiffs, they were to have judgment for the amount of the judgment recited in the delivery bond, interest, fees, commissions, &c.

His Honor gave judgment for the defendants, upon the ground that they were discharged from the obligation of their bond by the seizure and sale of the slaves by the sheriff under the county court executions,—it being on that account *impossible* for them to make the delivery. The plaintiffs appealed in error.

The debate here related—1. To the extent of the responsibility of the defendants, if responsible at all; and this involved the question, whether the bond was to be controlled by the act of 1831, c. 25, or by the previous laws upon the subject of delivery bonds? If by the former, the defendants were responsible only for the value of the property specified in the bond, not delivered. If by the latter, they were responsible for the whole debt of the plaintiffs, without reference to the value of the property levied upon under their execution. 2. To the amount of damages sustained by the plaintiffs, by reason of the non-delivery. Was it the value of the negroes, or only so much of their value as they would have been entitled to receive? And here the question arose, whether the plaintiffs in the other executions of the same teste, and levied on the same negroes were entitled to a part of their value?

WRIGHT, for the plaintiff, said—1. One question raised by the record, is, whether the delivery bond sued on, is to be controlled by the act of 1831? We contend that act can have no effect upon this bond; if so, it is immaterial what the value of the property levied on is, when the bond became forfeited

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4 Yer. 117.

That the legislature intended the act to operate prospectively, is manifest from its purview, and especially the second section. Bacon says, "the most natural and genuine way of construing a statute, is to construe one part by another part of the same statute." 4 Ba. Ab. 645. The sense and meaning of the whole act is the law. *Id. Ibid.*

Again, it is undeniably true, that the second and subsequent sections have no application to this bond; and it cannot be supposed, for a moment, that the legislature intended to affect, by the first section of the act, a class of cases not provided for in the subsequent sections. No reason can be given for such distinction. The first section lays down its objects and principles in general terms; the second section proceeds immediately to give the details of its operation, and to designate the class of cases upon which the act was to operate.

Again, by the law, as it stood prior to this act, the levy and the forfeiture of the bond, whether the property was of value to pay the debt or not, discharged the original judgment, and those only who executed the bond became liable. *Camp vs. Laird*, 6 Yer. 246; *Brown vs. McDonald*, 8 Yer. 160.— These two cases are identical with the one now before the court. The executions issued the same day, and the levies and bonds and forfeitures occurred at the same time. It follows, therefore, if the act of 1831 controls this bond, the plaintiffs may lose their whole debt, the judgment being satisfied; and their only remedy being upon the bond, if that proves insufficient, the residue of their debt is gone!

And if the plaintiffs have a remedy against the original defendants in the judgment, how is that remedy to be enforced? by motion or by a new suit at common law?

A construction so unjust, inconvenient, and against reason, will not be given. 4 Ba. Ab. 653.

This bond cannot, by any possible construction, come wholly under the act of 1831; if not, why should any portion of the case be effected by its provision?

By the provisions of the act of 1831, the levy of a *fi. fa.* upon property of the principal debtor, sufficient to pay the

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debt, and the taking of a delivery bond and its forfeiture, do not discharge the judgment. The original parties thereto are still liable; but in the case of *Camp vs. Laird*, this was held to be a satisfaction of the judgment and a discharge of Mrs. Camp, who did not join in the bond; if that decision is to be regarded, the act of 1831 can have no influence in this case. 6 Yer. 246.

Such a construction must therefore be given as to avoid these absurdities. In all cases, therefore, where the execution issued prior to the passage of the new law, the old law governs; but *aliter*, if the execution issued after the passage of the act of 1831. 7 John's Rep. 477.

Lastly, The agreed case fixes the liability of the defendants for the whole debt, *minus* the payment by Harney.

The *fi. fas.* of Ezra Webb & Co., John Laird and Kercheval, Scoggin & Co., bore the same test, and were entitled to a *pro rata* division of the property levied on, and of course the Sheriff might lawfully levy, one or all of them upon the same property. *Porter vs. Earthman*, 4 Yer. Rep. 358; 3 Murphey. Rep. 43.

As to the cases of Robert Turner and Paul J. Watkins, on the former no *fi. fa.* was issued from the August Term of the circuit court 1831; and on the latter the *fi. fa.* issued was not levied. It is clear they were not in the way of our execution.

It seems, therefore, that there was nothing in existence at the time the bond sued on was taken, that can exonerate the defendants from the payment of this debt.

3. The next question is, has any thing transpired since the execution of the bond, that is sufficient to release them from its penalties? It is supposed and argued by the defendants, that they, in law, complied with the conditions of the bond, by doing what they say was equivalent to a delivery of the negroes. It was upon this ground the circuit Judge put the case. For the plaintiff, we contend nothing of this sort happened.

1. The negroes having been seized by virtue of the execution in favor of Kercheval, Scoggin & Co., on the 12th day of December, 1831, the sheriff's lien, created thereby, re-

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maintained until the forfeiture of the delivery bond sued on, and if the negroes had been delivered on the day of sale, the priority of the plaintiff's levy would have prevailed. *Lusk vs. Ramsey*, 3 Mun. 417; *Porter vs. Shewell et. al.*; Supreme Court, Nashville, MSS. But the moment the bond was forfeited, the lien of the county court executions attached.

2. Between the taking and forfeiture of the delivery bonds, the negroes being in the custody of the law, could not be seized or taken by a subsequent execution. The seizure made by the sheriff, under the county court executions, during this period, therefore, operated nothing. By the levy of an execution, a special property is vested in the sheriff, the whole property in the goods is divested out of the debtor, and the general property is in abeyance until the day of sale. Hence nothing is left for the subsequent execution to affect; a levy gives the sheriff no power or control over the goods. 7 Law Lib. 131, top page; Cro. Car. 149; Property once levied on by a sheriff is like money in his hands made on a *fi. fa.*, or balance on hand, after satisfying the judgment, it is not the subject of levy in his hands. *Turner vs. Fendall*, 1 Cranch. 122.

But 3. If a levy in such case could be made, it must, of course, be subject to the lien and priority of the levy already made; and if the property be left in the actual possession of the debtor until the day of sale, it is his duty to deliver it in discharge of the bond. This results from the very nature of his undertaking. *Lusk vs. Ramsey*, 3 Mun. 417.

4. But aside from all this, on the day of sale, and for a long time before and afterwards, the debtor and his sureties in this bond, had it perfectly in their power to deliver this property. It was in their actual possession and fully under their control.

5. But to go further: where a person by word undertakes to do an act, it is not sufficient for him to show that he has done all in his power; for the condition is for his benefit, and if not performed he is subject to the penalty. This rule is subject only to three exceptions, to wit, where the condition is prevented being performed by the act of God, the act of the law, or the act of the obligee. *Dougherty vs. Neal*, 1

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Saund. 211d, 214, 215, also note 2, latter part. He was to deliver the property or pay the debt. It is not pretended that he was prevented, either by the act of God or of the law. And if the obligor might have performed the condition he was bound to do so. *Bigland vs. Skellon*, 12 East, 436; *Mounsey vs. Drake and Goff*, 10 Johns. Rep. 27; *Mitchell vs. Patillo* 2 Hawk's Rep. 40.

When a person undertakes to do an act to a stranger, nothing short of a performance will discharge the bond; an offer and refusal on the part of the stranger will not do. 10 Johns. Rep. 27; 2 Hawk's Rep. 40. In this case there was no offer or attempt to perform the bond. It is not sufficient that the Sheriff might have taken the property, and did not. 10 Johns. Rep. 27.

6. It is undeniably true, that the property was subject to the levy of our execution at the time it was made. If the defendants had not interposed by giving this bond, our debt would have been secure. We had no power to say they should not give the bond; nor had the sheriff. We were forced to this course without our consent. The act of the defendants in giving the bond, and its subsequent forfeiture, was a complete satisfaction of our judgment, and a destruction of the lien created by our levy. If the defendants confided too much when they became the surety of Brown, it was their own folly; they interposed against our wish, and should sustain the loss.

7. If the principle should be assumed and decided that the defendants are not liable, then the plaintiffs have lost their debt forever, without any neglect or fault on their part. They have no remedy on the original judgment. The sheriff did nothing but his duty in all that he did. He was bound to receive the delivery bond when tendered; had no power of control over the goods until the day of sale, and not then, if they were not delivered. This court, in a bill of interpleader, filed by the sheriff, have already determined that the lien of our levy was lost by the forfeiture of the bond sued on, and that the county court executions were entitled to the proceeds of the sale. If so our only hope is upon the bond.

8. If it should be determined that the taking of the deli-

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very bonds, discharges the lien of the levy before its forfeiture, still we must recover; the fact that the property could be legally taken and applied to other executions, will not excuse a performance of the bond. 3 Mun. 417.

If the levy was destroyed, and the sheriff bound to seize the property under other executions, it follows, that when he possessed the property he had no power to apply it in discharge of the bond. 3 Mun. 417.

Combs, for the defendant, argued—that at the time of the levy and bond in favor of the plaintiffs, the negroes were not the subject of levy, being then in the custody of the law by virtue of the levy of the Governor's first execution.

A sheriff cannot take in execution goods, pawned or gaged; nor goods demised or let for years; nor goods distrained; nor goods previously seized upon execution. Croke Car. 149; Roll's Abridgt. 893; 4 Term. Rep. 640, 651; Shower's Rep. 174; 7 Modern Rep. 37; 6 Bac. Ab. 176 Sheriff N.

That the negroes were still held and bound by the Governor's execution, see *Carroll vs. Fields*, 6 Yerger, 305.

2. That after the levy of the plaintiff's execution, and taking the delivery bond by the sheriff, and before the day stipulated for the delivery of the property, the same sheriff seized and took into his custody and possession, the same property, and kept it until he afterwards sold it to satisfy sundry executions, and therefore there was no breach of the condition.

If by the act of the law, the act of the covenantee, or the act of God, it be put out of the power of the covenantor to perform, this will be a good defence to a suit on the covenant. Vide Croke, Eliz. 374; Coke. Litt. 206. b. & 210 b.; Powell on Contracts, 417, 418 and 419.

In this case, then, if the sheriff acted correctly, when he seized the property by virtue of the county court executions, he was the agent of the law, and the act was that of the law, and defeated the performance by defendants. If the sheriff did not act legally when he seized the property upon those executions, because of the former incumbrances, it follows, of course, that the levy and seizure by virtue of the plaintiff's execution, was also illegal, because the property at that time was subjected, to the Governor's execution, by virtue of a pre-

vious levy thereof, made on the 12th of May, 1831, that execution being still unsatisfied.

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3. The plaintiffs abandoned their right to enforce this covenant by taking out an *alias fi. fa.* That the right to enforce the performance of a covenant may be lost by abandonment, see 9 Mod. Rep., 2 and 3; 2 P. Williams, 82; Powell on Contracts, 420; 8 Rep. 92. By taking out the *alias fi. fa.*, the plaintiffs clearly manifested their intent to abandon the first *fi. fa.*, and the proceedings under it, because the *alias* was in direct opposition to the proceedings of the first *fi. fa.*

4. Although the defendants might not have satisfied the covenant on the day stipulated, yet they did afterwards comply with, and satisfy the covenant, by a delivery of the property to the sheriff; and it was by him sold to satisfy all such process as he had then against it so far as it would go. So that neither the plaintiffs, nor any one else, has received, or sustained any injury on account of the non-delivery of the property on the day stipulated for the delivery in the condition in the plaintiff's bond.

TURLEY J. delivered the opinion of the court.

January 17

Previous to the passage of the act of 1831, c. 25, the surety in a forfeited delivery bond was responsible for the payment of the whole amount of the judgment, without regard to the value of the property levied on. This sometimes operated a great grievance; to remedy which, the statute provides, that "the security or securities, on any forfeited bond for the delivery of property levied on by execution, shall not be held responsible for more than the value of the property specified in such bond, that shall not have been delivered on the day of sale."

This statute governs the case under consideration. Where the bond, as in this case, was taken after its passage, it will not do to say that it only applies to cases where the execution was issued after its passage; for it is by virtue of the bond, and not the execution, that any rights are acquired against the surety. And the statute makes no exceptions in favor of executions issued before its passage.

Then, in this case, the plaintiffs are entitled to judgment

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against the sureties in the forfeited delivery bond, for the amount they lost by their failure to comply with their contract.

It has been held, that a levy upon personal property and a delivery bond, is a satisfaction of the judgment; and that the property levied on is released by a forfeiture of the bond, and liable to other executions. But to constitute a satisfaction of the judgment, the property levied on must be of value sufficient to pay it; inasmuch as the surety in the delivery bond, since the act of 1831, is only responsible for its value, and if it be not of value sufficient, it is only a satisfaction *pro tanto*.

The property levied on by plaintiff's execution, is stated in the agreed case, to have been worth \$3444; but there were three other executions, bearing the same *teste*, and having an equal lien levied on the same property; to wit, one in favor of John Laird for \$ 679 55; one in favor of Ezra Webb & Co. for \$1751 20; and one in favor of Watkins for \$438 52; and bonds taken for a delivery on the same day with plaintiffs. Now if the property had been delivered and sold, the proceeds would necessarily have been distributed *pro rata* among the other three creditors: to wit, the plaintiffs, John Laird, Ezra Webb & Co., and Watkins. Then, what loss have the plaintiffs sustained by the non-delivery? Just the amount they would have received if the property had been delivered and sold; to wit, their share, to be estimated in the proportion their debt bears to the debts of the other three creditors; and for that amount, with interest, they are entitled to judgment here.

Judgment accordingly.

YARBOROUGH vs. ABERNATHY.

PRACTICE. *New trial—preponderance.* The court of errors will set aside verdicts approved by the circuit courts, in those cases only, where the weight of the testimony against the verdict greatly preponderates.

BOUNDARY. *Remarking, principle of the estoppel of—whether it binds feme covert?* Where the original boundaries of private possessions have been destroyed, or are unknown, or not well ascertained, a survey made by the owner in reasonable conformity with the calls of his title deeds or papers, is held to be an ascertainment of the very land owned by him, and to conclude him upon principles of public policy, and for the security and repose of others. *Quære*, whether the reason of the doctrine applies to *femes covert*?

SAME. *Same—ignorance of the true line necessary to give effect to remarking.* If the parties know where the true line is, and by agreement, make another,—this would be a full transfer of the land, and would be void by the statute of frauds.

The annexed diagram is a connected representation of six tracts of land of 5000 acres each, granted by the State of North Carolina to the persons whose names are inscribed in them respectively. They lie in Giles county, on Richland creek. The controversy in this case arose in reference to the southern boundary of the tract granted to Doherty, and the northern boundary of that granted to Charles Polk. The grants for both tracts were issued on the 10th of July, 1788. That to Doherty was numbered 52, and that to Polk, 64.

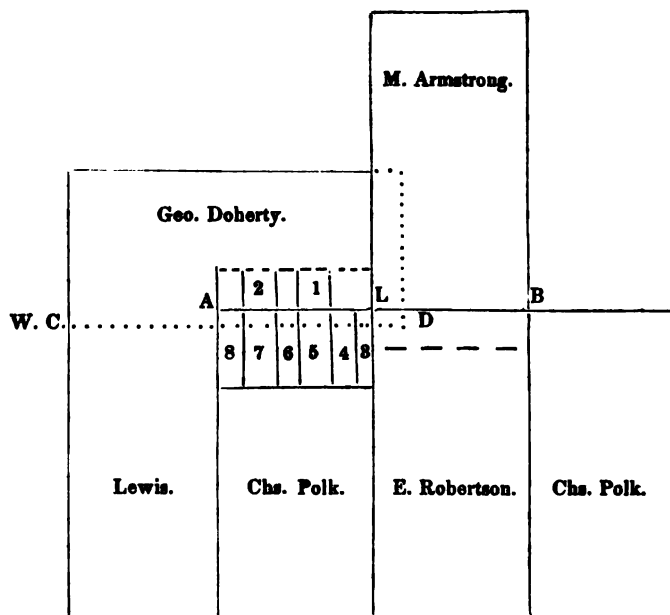
A white oak, marked W. C., was called for in Doherty's grant, as the south-west and beginning corner of his tract. A stake was called for as the south-eastern corner.

The north-east and north-west corners of Polk's tract were designated in his grant by stakes.

Doherty died about the year 1800, at his residence in North Carolina, and left two daughters, Frances W., born June 8, 1786, and Helen M., born August 24, 1788, his only children and heirs at law. Frances married one Bond, in 1807, and Helen, David Yarborough, in the same year.

William P. Anderson and John Strother were the agents of Doherty's heirs; and by their order George Breckenridge re-surveyed and marked the Doherty tract about the 16th of February, 1809. In making this survey, he began at the white oak, W. C., and marked the lines and corner round to the south-east corner, which he designated by a stake,

Yarborough V. Abernathy. hickory, and two sugar trees at D. He then deferred the marking of the south boundary, from D to W. C. till he should ascertain the dividing line between Charles Polk and Lewis. In doing this, he ran from Charles Polk's south-west corner, an *ash and hackberry*, north, the distance called for in his grant, and marked for his north-west corner an *ash*, at A. He then resumed the survey of Doherty's grant, not at D, but by running and marking from the beginning, W.C. to D, in doing which, he crossed the line which he had just run as Polk's western boundary, south of the ash at A, which he had marked as his north-west corner. Thus Doherty's tract was made to interfere with Charles Polk's, Elijah Robertson's and Martin Armstrong's tracts in the manner represented by the dotted lines.



Polk's tract was conveyed by deed dated October 8, 1808, duly proved and registered, to several persons, who, in 1809 or 1810, conveyed the parcels marked 3, 4, 5, 6, 7, 8, to Wilkinson, Tarpley, Abernathy, Scales, Mitchell

and Harwell, who immediately took possession, which has been continued ever since.

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In 1816 or 1817, Bond, who had married Frances W. Doherty, died in Maury county, where he settled with his wife in 1808; and on the 6th of March, 1821, she married James B. Porter. On the 18th of September, 1830, Yarborough and his wife joined in a deed, conveying to Abernathy, the owner of No. 5, the tract marked 1; and to Mitchell, the owner of No. 7, the tract marked 2; thus recognizing the line, run from the ash marked by Breckeridge as Charles Polk's north-west corner, as the true northern boundary of that survey, and of course, as the southern boundary of the Doherty tract.

The line from L to B, had been reputed to be the north boundary of Robertson's tract, from 1816 to 1821, when an agent of Robertson marked a line considerable south of it, as Robertson's north boundary; and then Robert McNairy, who owned a part of Armstrong's tract, entered as vacant the land lying between the new and the old lines.

Upon the supposition that the dotted lines were the real boundary of Doherty's survey, and to recover the lands held under Polk's title, and Robertson's and Armstrong's titles north and west of those lines, an action of ejectment was commenced on the 20th of December, 1837. The demises were laid in the names of Porter and wife, Yarborough and wife, and Mary W. Burke; and notice of the action was served on Mr. and Mrs. John H. McNairy, Elizabeth Dickson, Alexander Tarpley, Henry Scales, Charles C. Abernathy, Elizabeth Mitchell, Rebecca Harwell, and Allen Wilkinson. At February Term, 1838, they were admitted to defend instead of the casual ejector, upon the common rule.

The cause was tried at June Term, 1838, before Judge ANDERSON, sitting instead of Judge DILLAHUNTY, and a jury of Giles.

Both sides adduced proof as to the true position of the disputed boundary. But the defendants relied also upon the statute of limitations, they having had uninterrupted possession from 1809 or 1810, under their deeds, which cover

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His Honor charged the jury, that they would have to balance and weigh the evidence applicable to each line, and give their verdict according to its preponderance; that if either of the lessors of the plaintiff was a *feme covert*, when the defendants took possession, and has so continued ever since, she would not be bound by the statute of limitations; but if one of the lessors, though *covert* when the possession was taken by the defendants, became *discover*t at any time since that possession was taken, the statute would commence running as to her moiety, and would bar her, though she again became *covert* before the seven years had elapsed; that it was unnecessary, in this suit, to determine any but the southern boundary of the Doherty survey, and if they looked to the evidence as to any other line, it must be with a view to determine that line, that if the defendants had had twenty years possession, though in some cases, that would justify a presumption that they had a title to it; yet this presumption would not arise against claimants who were *femes covert*, or infants, a part or all of the time.

The jury found a verdict for the defendants. The plaintiffs moved for a new trial, which being refused, they appealed in error.

WRIGHT, for the plaintiff, as to the validity and effect of the remarking by Breckenridge, cited *Williams vs. Buchanan*, 2 Ten. Rep. 278; *Garner & Dickson vs. Morris*, 1 Yer. 62; *Houston vs. Pillow*, 1 Yer. 461; *Davis vs. Smith & Tapley*, 1 Yer. 496; *Singleton vs. Whiteside*, 5 Yer. 40; *Houston vs. Matthews*, 1 Yer. 116; *Gilchrist vs. McGee*, 9 Yer. 455; *Nichol vs. Lytle*, 4 Yer. 456; *Proffit vs. Williams*, 1 Yer. 89.

But none of these cases, he said, decided what effect the doctrine of remarking would have upon the rights of a *feme covert*. The real and only question was, can the lands of a *feme covert* be lost through any *laches* of the husband, or can

her estate be divested in any mode except by her privy examination, upon a deed duly taken? To maintain the negative, he cited, *White vs. Cook & Wife*, 15 Johns. R. 483, 546, 547, 548, 550; 17 Johns. R. 167; *Lassiter & Wife vs. Turner*, 1 Yer, 429; *Watson vs. Watson*, 5 Conn. R. 77; act of 1723, c 4, § 6.

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2. As to the power of a party, laboring under a disability which prevents the operation of the statute of limitations, to bring a suit either during the continuance, or after the removal of the disability, he cited *Watson vs. Watson*, 5 Conn. R. 77; Angell on Lim. 218; *Chandler vs. Villett*, 2 Saunders, 121a, note 5; acts of 1715, 1797 and 1819.

These authorities, he contended, proved that no running of the lines of a *feme covert's* land, or acquiescence in, or recognition of such lines, by deeds in which she joined her husband, or otherwise would bar her suit to recover her land, which she had not actually conveyed away in the manner prescribed by law.

3. He said that a grant is never presumed but against those who are capable of *laches*, which a *feme covert* is not. Angell on Lim.; 3 Starkie's Ev. 1203 note d; Id. 1216; Angell on Adverse Enjoyment, 65, 70, 76. The *laches* of him who has a mere temporary interest cannot prejudice the owner of the inheritance; and in such case, a deed, grant, &c. will not be presumed from adverse enjoyment, 3 Starkie's Ev. 1216, 1218; 2 Saund. 175d; Angell on Adv. Enj. 116.

And finally he insisted that if there was no error in the charge of the judge, still there ought to have been a new trial, because the verdict was against evidence.

FIELD & COMBS, for the defendants, insisted, that his Honor, the circuit judge had fairly placed the facts of boundary before the jury, and charged nothing to the prejudice of the plaintiffs; that the jury having found the line claimed by the defendants to be the true line, the court would not disturb their verdict, unless there was a decided preponderance of evidence against it; that though there was evidence in favor of both lines, yet so far from there being a clear preponderance against the verdict, the testimony clearly sup-

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ported it; and consequently no new trial would be granted and they cited to this point, *Grubb vs. McClatchy*, 4 Yer. 444; *Gibson vs. Gibson*, 9 Yer. 330; *Id.* 271; 4 Yer. 323; 4 Yer. 152-3, 505; 3 Yer, 107.

2. As to the point of the disability of the *femes covert*, they observed, that the defendants had been in possession since 1809; that Mrs. Porter, one of the lessors of the plaintiff, was a *feme sole* from 1815 or 1817 to 1821, and of full age, and was therefore clearly bound by the statute.

3. That the boundary was as claimed by the defendants was maintained, they said as well by reputation, 4 Yerger, 486; 3 Starkie, 1030; by the remarking and recognition of the parties, 1 Yer. 116, 496; 5 Yer. 34; 8 Yer. 406; 2 Yer. 290; 1 Tennessee R. 509; 9 Yer. 455; as by lapse of time and acquiescence. 7 Wheaton, 59; 12 Ves. 266, 267, 252; 5 Johns. C. R. 550; 1 Hayw. 469; 2 Hayw, 128, 147; 2 Ten. Rep. 312, 151; Cowper, 100, 102.

REESE, J. delivered the opinion of the court.

January 19.

It is contended for the plaintiffs that the circuit court erred in refusing to grant a new trial, upon the ground that the verdict is not well sustained by the evidence.

This case, therefore, is only another added to the long list of cases in which we have been constrained to repeat, that this court neither can, nor ought to weigh and balance the testimony with a view to disturb the verdict of the jury and the judgment of the circuit court. We adhere to and again announce the principle, as familiar from frequent repetition, as it is obviously correct, that we will set aside verdicts approved by the circuit court, in those cases only, where the weight of the testimony against the verdict greatly preponderates. In the present case, however, we are of opinion, that the testimony well warranted the verdict.

The defendants had been for many years in possession of the land in dispute, up to the line claimed by them. It had, to that line, been in their actual cultivation; that line had for many years been reputed in the neighborhood, and also, by those whose interests were affected by it, as the true line dividing the grants under which the plaintiff's and defendants

claim. The plaintiffs and their agents had long so recognized it, and had for more than twenty years acquiesced in the possession and cultivation by the defendants and others up to that line; they had caused surveys of small tracts to be made with a view to a sale, which were bounded upon that line, as their southern boundary; and finally, they sold and conveyed those tracts to the defendants themselves, and in their deeds called for the northern boundary of the defendants, which they described as their own southern boundary.

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Some of the plaintiffs are *femes covert*, and in respect to their attitude and rights, as affected by the above facts and circumstances, the circuit court charged the jury, that they were not barred by the statute of limitations; that they were not to be affected by acquiescence, as if they had been *sole*; that they were not concluded or estopped by the re-marking surveys of their husbands, or the agents of their husbands, nor by joining them in deeds of conveyance, which described and acknowledged the line in question, as their southern boundary; but that the jury were to regard those facts and circumstances as evidence only of where the true line was to be found.

Whatever error may exist in reference to some of these propositions is not error against the plaintiffs, or error on account of which they should be heard here, or elsewhere to complain.

It is argued that a *feme covert* cannot convey land, except by deed acknowledged according to the statutes, and cannot, therefore, be affected by the re-marking survey of her husband. We answer, neither can the husband transmit title to land except by deed. The doctrine of remarking does not, in either case, proceed upon the idea of transmission of title. It is founded upon the assumption, that where the original lines have been destroyed, or are unknown, or not well ascertained, a survey made by the owner in reasonable conformity to the calls of his title deeds or grants, shall be held and taken to be an ascertainment of the very land owned by him; and such act, *in pais*, shall, upon principles of public policy, and for the repose and security of others, conclude him.

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Whether the grounds of policy and principle upon which this doctrine is founded do, or do not, apply to the interest of *femes covert*, it is not necessary here to determine. For the circuit court decided the question in the negative; and of this, the plaintiffs at all events, cannot complain.

But it is said, that the acquiescence, the recognition of the line, the remarking, and the conveyances were all made in ignorance of the true line.

We answer, that so far as the doctrine of remarking is concerned, this ignorance of the parties is necessary to give to that doctrine a different operation. For if parties know where the true line is, and by agreement make another, this would be a parol transfer of the land, and would be void by the statute of frauds, as has been decided by this court. *Gilchrist vs. Mc Gee*, 9 Yer. 455.

We are of opinion, therefore, that the judgment be af-

BASS vs. THE MAYOR OF NASHVILLE.

CONSTITUTIONAL LAW. Lotteries—Privilege. A grant of a lottery, by a private act of the Legislature, is not a contract in the sense of the constitutional provision, against laws impairing the obligation of contracts.

SAME. Same—privilege. If there be a general law, prohibiting lotteries, and inflicting penalties for drawing them, and the Legislature authorize one for a specific purpose, by a private act, such act is only a grant of an immunity from penalties and indictments in that particular instance, and for the specified object.

SAME. Vested Rights. If the grantees of such immunity, draw one or more classes of the lottery, and pause in their proceedings though the specific purpose for which the immunity was granted, remains unattained, there being no purchaser of a scheme or holder of a ticket to be injuriously effected, the legislature may prohibit the further exercise of the privilege, without violating vested rights.

SAME. Same. The 5th section of the 11th article of the amended Constitution, providing that the legislature "shall pass laws to prohibit the sale of lottery tickets in this State," is itself a prohibition of lotteries; and a sale of the proceeds of past and future drawings, in the interval between the ratification of the constitution and the passing of the act of 1835, ch. 47, though founded on the consideration that the purchasers of the drawings would do the thing for which the lottery was designed, does not vest a right to the drawings in the purchaser, making it unconstitutional to prohibit the drawing; the pleadings not showing that the purchaser, before the passing of the act, had been at any trouble, made any advances, or incurred any liability.

LOTTERY.—Chancery. A sale by the grantees of what had been made and should be made by drawing a lottery, in consideration that the purchasers do the thing for which the lottery was authorised, will not be enforced in a court of equity, by a decree that the grantees draw the lottery, though the purchaser execute the contract on his part. The parties will be left to enforce their rights at law, or abandon them as they may choose.

By a private act passed by the Legislature of Tennessee on the 15th of November, 1831, entitled—"An act to authorise a Lottery for the continuation of Union Street, in the city of Nashville," the Mayor of the city, Robert Woods, John P. Erwin, Henry R. Cartmell and John M. Bass, were appointed trustees, with full power and authority to manage and superintend the drawing of a Lottery, for the purpose of raising a sum of money not exceeding seventeen thousand dollars, to be applied to the opening of a street in Nashville, from College to Market Street, being a continuation of Union Street, upon such scheme, in one or more classes, as they or a majority of them, might think best.

The trustees were authorised to make sale of the lottery tickets, to deposit them for sale with any person, to farm, let out, or sell one or more classes of the lottery; and to take

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bonds from persons to or with whom such sales or deposits might be made or intrusted,—and in case of failure to comply with such bonds, they, or the survivors of them, might enforce them by law; and to do and transact all things necessary and proper to carry into effect the provisions of the act.

They were to appropriate the proceeds of the lottery when drawn, or a sufficient sum, when raised, after defraying the necessary expenses of the lottery, to the purchase, from the owners, of the property necessary for the opening of the street; or for the payment of damages assessed to said owners by opening said street, in pursuance of an act of the Legislature, passed November 14, 1827, entitled “An act to authorise the circuit court of Davidson county, to order the opening of any new street, lane, or alley, in the town of Nashville.”

The trustees made a contract with Spoford and Estill, and also with John L. Brown, Exchange and Lottery Brokers in Nashville, for the drawing of several classes of the lottery, for which they were to receive a certain amount *per cent.* of the sums invested in each class. Several classes were drawn, which produced to the trustees upwards of 6000 dollars, which they put at interest to accumulate till the sum necessary to open the street should be raised. The brokers then gave up the contracts, and no one for a long time offering to carry on the business, and it having been ascertained that the sum necessary for opening the street would not fall short of 15,000 or 16,000 dollars, the prospect of opening it became remote and unpromising.

In this state of things, the following written contracts were executed.

“We, the undersigned, agree and undertake to and with, the commissioners and trustees of the Union Street Lottery, upon receiving from them the funds already realized from the operations of said lottery, *and all which may hereafter from time to time be realized*, to open and extend said street within two years from the first of January last, according to the intention and meaning of the act of the General Assembly of this State, authorising said lottery. And in case we fail to open said street within the time aforesaid, we hereby undertake and

agree to refund to said commissioners or trustees, or their successors, the sums received by us respectively. In witness whereof we have hereunto set our hands and seals this 3d day of March, 1835. John M. Bass, [seal]; A. L. P. Green, [seal]; J. T. Elliston, [seal.]”

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“We, the undersigned commissioners or trustees of the Union Street Lottery, hereby agree to, and with, A. L. P. Green, Joseph T. Elliston and John M. Bass, that we will pay over to them, from time to time, the funds already realized, *and which may hereafter be realized*, by us, from the operations of said lottery, for opening said street, upon their undertaking to open said street as contemplated by the act of the General Assembly of the State, authorising said lottery.

In witness whereof we have hereunto subscribed our names, the 3d day of March, 1835. Signed John P. Erwin, H. R. Cartmell, Robert Woods, commissioners or trustees.”

Bass, Green and Elliston proceeded, at an expense of 15104 dollars and 54 cents, to purchase the property which was occupied by the street; two of them, Bass and Green, contributing each six feet of ground half the length of it; to remove the houses standing on it, and to open it for public use, all of which they effected one year in advance of the time allowed by the contract. The trustees paid them the moneys which had been realized out of the lottery, at the date of the above contracts, amounting to the sum of \$ 6611 53 cents.

The new Constitution of Tennessee, which was made on the 30th of August, 1834, contained the following provision, art. 1, § 5:—“The Legislature shall have no power to authorise lotteries for any purpose; and shall pass laws to prohibit the sale of lottery tickets in this State.” Under this provision, the Legislature of 1835-6 passed “an act to prohibit the drawing of Lotteries and the sale of Lottery tickets,” on the 13th of February, 1836. The first section is a repeal of all laws which authorise any person, or body corporate or politic, to draw any lottery for any purpose whatsoever. The second section prohibits the drawing, or attempting to draw, any lottery in the State, under the penalty of 1000 dollars, and three months imprisonment. The third section prohibits the

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vending, or attempting to vend, lottery tickets, to be drawn in or out of the State, under a penalty of 500 dollars and one month imprisonment. The fourth section prohibits the printing, publishing, circulating or distributing, any written or printed scheme for the drawing of a lottery in or out of the State, under the same penalties as described in the third section.

The trustees now refused further to draw the Union Street Lottery, so that Bass, Green and Elliston, if they could not be compelled to draw it, would be considerable losers by reason of their opening the street. They, therefore, on the 18th of October, 1838, filed their bill in the chancery court at Franklin, against Henry Hollingsworth, the mayor of the city, Robert Woods and John P. Erwin, Cartmell having removed from the United States, stating all the above facts, praying that the defendants might be compelled, by a decree of the court, to cause the lottery to be drawn, till out of the proceeds a sum of money might be made, which, when added to the sum already paid the complainants, would be equal to the sum expended by them in opening the street," &c.

The defendants filed their answer, admitting all the above facts, stating the provisions of the constitution and the act of Assembly already recited, and averring that for this reason only, they had not proceeded with the lottery; but professing themselves ready and willing, if said act of Assembly should be adjudged not to be the law of the land, to proceed with the lottery, and referred the matter to the decision of the court.

The case was set for hearing upon the bill and answer, and was heard on the 15th of November 1838, by his Honor Chancellor BRAMLITT, who being of opinion that the act of 1835 was not unconstitutional, and did not impair the obligation of any contract, or infringe any right vested under the private act of 1831, dismissed the bill. The complainants appealed in error.

MEIGS, for the complainants, cited 1 Kent 25, to show that contracts are not impaired by revolutions of government, nor by legislation. Id. 413 et seq: that the prohibition to pass laws impairing the obligations of contracts extends, as well to cases where the parties to the contracts take beneficially for themselves, as when they take in a fiduciary cha-

racter. 1 Kent, 417; *Dartmouth College vs. Woodward*, 4 Wheaton, 518, Story's opinion. And he insisted that the act of 1831 was a contract, wherein the State engaged, in consideration that the trustees would, for the public good, open a highway in the chief city of the State, to allow them to draw a lottery to raise the money necessary to pay the expenses of the improvement; that as the trustees had complied with their part of the contract, they became vested with a right to draw the lottery to raise the money in question; that to deprive them of this power was not only a breach of faith, after the public was in the enjoyment of the improvement of the highway, but was a destruction of a vested right; that consequently, the act of 1835 was not to be construed as a prohibition to draw this lottery, and the failure of the commissioners to draw it was without excuse. He also cited *McGimpsey vs. Booker*, 5 Yer. 139, and cases there cited.

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E. H. EWING, for the defendants, argued that the act of 1831 was not a contract with the trustees. It merely conferred a privilege, a special power, which the Legislature might revoke and annul at any time without injustice. It might, indeed, he said, produce detriment, under the circumstances which had happened, but it was *damnum absque injuria*. The courts could not redress it; and there was no remedy but by an application to the sense of justice of the legislature.

REESE, J., delivered the opinion of the court.

1. We will consider the nature of the *interest*, which the defendants had, as the Trustees of the Union Street Lottery, by virtue of the provisions of the act of 1831, c. 69, (private acts) for the purpose of ascertaining whether art. 11, § 5, of the reformed constitution, or the 47 ch. of the acts of 1835, passed in pursuance thereof, can be held to have legally terminated that interest.

So early as 1809, c. 39, the drawing of a lottery within this State was prohibited by legislative enactment and by the infliction of severe penalties. By judicial construction upon that act, and the several acts to prevent and punish gaming, all persons concerned in lotteries were held to be guilty of gaming and to be punished by indictment as for that offence.

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Lotteries then stood reprobated by legislative enactment and by judicial decision, as contrary to public policy, and to good morals; and a wise and enlightened public sentiment every where sustained the enactment and the decision.

Under such circumstances, we ask, what was conferred upon the defendants by the act of 1831, c. 69? Nothing, certainly, but an immunity, in that particular instance, and for the specified object, from penalties and indictments; an indulgence granted to them to perform acts which were, in general, held to be against public policy and good morals; a permission to do that, for the doing of which, all others would have been subjected to fine and imprisonment. If, then, before the defendants had done any thing under the act of 1831, this privilege conceded to them, of gaming, without liability to criminal prosecution until they had realised a specified amount of profits, had been abrogated by a subsequent legislature, and they had been placed upon the same ground with all other citizens, of what could they have complained? Could they have, on just grounds, alledged that a contract had been impaired, or a right divested? See 3 Story, § 1379, 1385. For this, surely, no one will contend. If, then, they had organised a scheme, and had drawn one or more classes of the lottery, as the bill alleges was done, and so to speak, one or two games had been played and finished; and the legislature finding a pause in their proceedings, when no purchaser of a scheme and no holder of a ticket could be injuriously affected, and availing themselves of this pause, had prohibited the further exercise of this extraordinary privilege, could the defendants be heard to object to the prohibition upon the ground that they had not realised all the profits which they had been promised, and which they expected? Certainly not.

2. In the precise state above supposed stood this matter, when the Convention, in 1834, adopted the fifth section of the eleventh article of the reformed constitution, in which they provide, that the legislature "shall pass laws to prohibit the sale of lottery tickets in this state." This was itself a prohibition, and was announced to the complainants before the formation of their contract with the defendants. And again, although that contract is dated before the act of 1835,

c 47, yet, neither the bill nor the answer alleges that the complainants, before the passage of that act, were at any trouble, made any advances, or incurred any liability whatever. They are therefore in no better situation with regard to the repealing law, than the defendants.

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3. If we had taken a different view of both the points above discussed, still we could by no means have decreed a specific execution of the contract, and ordered the drawing of a lottery, which might, under the provisions of the act of 1835, c 47, have subjected hundreds of our citizens, the drawers of the lottery, the vendors of tickets, the parties, publishers, and circulators of the scheme, and even the ticket holders themselves, to prosecution by indictment.

A court of chancery in such case, upon the clearest principles, would leave the parties to enforce, or to abandon their rights and remedies at law, as to them might seem best.

Let the decree be affirmed.

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SLAVES. *What disposition of a father to a child is a bailment or gift within the North Carolina act of 1806—Limitations.* If, on the marriage of a child, slaves be put by the father into his possession, without any expression of the father's purpose therein, it is to be regarded as a bailment and not a gift under the North Carolina act of 1806. And no length of such possession will give the bailee title under the act of limitations. But, in such case, he may acquire title under that act, by afterwards assuming, with the father's knowledge, to hold them for himself; or, by the father's treating the possession as the possession of the child, as by requesting the child to give the slaves to a grandchild: for from hence it may be inferred that the transaction was a gift at first, or that a gift had been afterwards made.

In the year 1814, William McKisick was married to Rebecca Sallard, the daughter of Charles Sallard, of Person county, North Carolina. The day after the marriage, Mr. Sallard put in McKisick's possession Ann a female slave, and a few months afterwards, two other slaves Murphy and Patsy. The possession of these slaves was transferred to McKisick without any condition at the time, and without any writing evidencing the manner of the transfer. Sallard had

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dealt with his other children in the same manner, except with two of them, to whom he made bills of sale of the slaves transferred to them. He had given McKisick less than the rest. In 1815 or 1816, Mrs. McKisick had a daughter, Eleanor, to whom her grandfather, Sallard, immediately afterwards, gave Sam, a slave, who, like the rest, was placed in McKisick's possession. Mrs. McKisick soon afterwards died. McKisick remained in North Carolina about eighteen years, all the time holding possession of the negroes. Being then about to remove to Tennessee, it seems, Sallard extracted from him a promise, that *he* would give the slaves to Eleanor on her marriage. On his removal to Tennessee, he brought the slaves with him, and kept possession of them here as he had done in North Carolina. In October, 1833, Eleanor married Orville McKisick; but the match being disagreeable to her father, he neglected and refused to make any provision for her.

Thereupon, about the 20th of May, 1836, a bill was filed in the chancery court at Pulaski, in the name of Orville and Eleanor McKisick, against William McKisick, in which the complainants stated that upon the death of Mrs. McKisick, the mother of complainant, Eleanor, Mr. Sallard, her grandfather, agreed that the defendant should take into his possession the three first named slaves, which then belonged to said Sallard, and that he, said defendant, should hold and keep them in his possession and use them until said Eleanor arrived at the age of twenty-one years, or married, when she was to have them and their increase. The bill charged that the gift of Sam was absolute to Eleanor, without any intermediate gift of the use of him to the defendant, in whose possession, however, he was put with the rest; that though Eleanor was married, and so the contingency had happened upon which the slaves were to be placed in her possession, yet the defendant refused to do it, or to account for the hire of Sam. The bill prayed that the negroes might be decreed to the complainants, with hire, &c.

On the 19th of September, 1836, the defendant filed his answer, in which he detailed the circumstances of the transfer of the slaves substantially as above narrated, denying

the existence of any such agreement as that supposed in the bill, i.e. that his daughter was to have the slaves at her majority or marriage, and averring positively that the gift of the slaves was absolute and unconditional to himself, before his daughter was born.

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The testimony introduced into the record was quite voluminous, consisting of many depositions, detailing McKisick's conversations, in which he said he intended to give the negroes to Eleanor. Amongst them were two of Mr. Sallard himself, which corresponded in substance with the statements of the answer; and from which the above narrative is principally extracted. Among the evidence was a copy of the North Carolina Act of Assembly of the 10th of December, 1806, declaring what gifts of slaves shall be valid for the prevention of frauds; and enacting that no gift thereafter to be made of any slave or slaves should be good or available either in law or equity unless made in writing, signed by the donor, and attested by at least one creditable subscribing witness; and that such gift should not be valid without probate and registration within one year after its execution, &c. &c.

His Honor Chancellor BRAMLITT heard the cause, at September Term, 1838, and being of opinion that the negroes had been received by the defendant upon the terms stated in the bill, decreed that he should deliver them up to the complainant; that he should account for their hire from the filing of the bill, no demand of the negroes having been proved to have been made by the complainants previous to that time. The defendant filed a petition for a rehearing, which his Honor disallowed, and the defendant appealed in error.

COMBS & COOK, for complainant said, by the North Carolina act of 1806, which is made a part of the record in this case, by being filed as evidence, no gift of slaves is good excepting the evidence of it be in writing, proved and registered. *McDonald vs. McDonald & Baker*, 8 Yer. 145. These authorities show, that at the time Sallard sent the negroes with his son-in-law and daughter, he did not *ipso facto*, part with the title, and his testimony shows that he neither parted with, nor intended to part with his title. The

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negroes were therefore Sallard's at the death of his daughter, Mrs. McKisick, and he had a right to give them to his granddaughter. This he did, and McKisick agreed to be her trustee; and his possession from thence forth was the possession of Elcanor, the complainant. The rest of the negroes mentioned in the bill are the increase of the original stock.

GOODE, for the defendant said, if complainants recover in this case, it must be upon one of these grounds, by gift, by purchase, or by the statute of limitations; as defendant has the possession of the property, and cannot be divested of it except by a superior title in the complainants.

Reliance cannot be placed upon a gift, nor a recovery had upon that ground, even if there were proof to establish it, because there is no allegation in the bill, except as to the boy Sam, to which such proof can apply. The bill containing the term "*agreed*" to express the manner in which they acquired title, if any, in the negroes, which term does not mean a gift, but a bargain, or contract, which imply a valuable consideration. Besides, the other parts of the bill exclude the idea that in the word *agreed*, a gift was intended to be embraced, because in a subsequent part to that above quoted, it is alledged, that the the negro boy Sam was given by Sallard to complainant Eleanor, thus plainly showing that a gift was not intended to be relied upon as to the first three negroes, and that it was designed to express a difference in the manner in which Sallard had been divested of title, if really the title had ever passed out of him.

Then as to all the negroes, except Sam, the bill, if it intends to alledge or aver any conveyance from Sallard to complainants, clearly alledges a sale and not a gift. But the proof no where shows a sale, or contract to sell, or treaty upon the subject of sale, either to complainants directly, or to any person for her use, but rebuts such an idea. As Sallard himself says, that he never received any valuable consideration from complainants, or any person for them, nor was there any agreement or understanding by which he was to receive any thing. But, on the contrary, the proof, if it establishes any mode of conveyance from Sallard to complainant, establishes a gift and not a sale or purchase. If then

the allegation in the bill is of a sale, or purchase, depositions tending to prove a gift, ought not to be allowed to be read, as it is a rule of law, that the evidence must apply to the facts put in issue; and that depositions will not be permitted to be read, which do not relate to some fact put in issue. 2 Mad. Ch. 438; *Clarke vs. Turton*, 11 Ves. 240; *Whaley vs. Norton*, 1 Ver. 484; *Strode vs. Strode*, 2 Chan. Cas. 196; *James vs. McKernon*, in appeal, 6 John. Rep. 543; *S. P. Lyon vs. Tallmadge*, in appeal, 14 John. Rep. 501; *Underhill vs. Van Cortlandt*, 2 John. Ch. Rep. 339; *Smith vs. Clarke*, 12 Ves. 480; 4 Hayw. Rep. 112; Fonb. Eq. 676, note; *Cowan vs. Price*, 1 Bibb, 183; *Coit vs. Owen*, 3 Dickens, 175.

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And if such depositions are read at the hearing, and the chancellor decides upon the evidence, though no objection be made at the time, the decree will be reversed on appeal. 6 John. Rep. 543; 14 Id. 501.

But it is insisted, that had a gift been expressly and plainly alledged in the bill, the depositions in the case do not prove it. They merely prove what McKisick had loosely stated in conversation, to be his intentions relative to his daughter. Such conversations not authorising the deduction of a trust which equity will recognise and enforce. 6 John. Ch. Rep. 1.

The complainants however contend, that notwithstanding the gift may be void under that act, not being in writing, yet that the evidence establishes such a holding of possession by defendant in trust for complainants, adverse to the title of Sallard, as will vest the title in the negroes in complainants, under the statute of limitations.

In answer to this, we insist, first, that the evidence does not establish such an adverse possession in trust for complainants, by defendants.

And secondly, we insist, if there was such an adverse holding by McKisick, in trust for complainants, as to entitle them to the property under the statute of limitations, if there was any allegation in the bill to which such proof was applicable, yet as there is no such allegation in the bill to which such proof was applicable, proof of that fact is not admissible,

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as the proof taken in a case must be pertinent to the issue.
2 John. Ch. Rep. 339.

The complainants here occupy a situation similar to a defendant in a court of law, wishing to take advantage of the statute of limitations, where it is a well established rule, that if reliance is placed upon the statute it must be pleaded specially, 1 Ven. 191; 1 Lev. 110; although it should appear on the face of the declaration, that the cause of action did not arise within the time provided for in the statute, as it forms no defence under the general issue. 2 Saund. 63; Salk, 278; 1 Ld. Raym. 153, 838; Saund. on Pl. and Ev. 642-3; Fonb. Eq. 329, *et seq.* In this last it is stated, that the same rules are applicable relative to the statute in both courts.

WRIGHT & F. B. FOGG, on the same side said, that the complainants attempt to recover, by proving that Charles Sallard, as they insist, made a gift of these negroes to the defendant, for the use of complainant Eleanor, and that as to the boy Sam, he made a direct gift to Eleanor. They admit, that under the act of 1806, these pretended conveyances were void; but say, that the defendant has held the negroes and other property for the use of complainant so long as to give her a title by the act of limitations.

There is no allegation in the bill, that the defendant held these negroes and other property for the use of the complainant, nor does the bill seek or attempt to make a case by operation of the act of limitations.

1. It is a settled rule, in reference to chancery as well as law pleadings, that the proof must sustain and not depart from the case made in the bill. A party is not permitted to state one case in his bill, and make out a different one in the proof. *Boone vs. Chiles*, 10 Pet. 201, 208, 209; *Harding vs. Handy*, 11 Wheat. 103; *English, et. al. vs. Foxall*, 2 Pet. 595, 611, 612; *Vattier vs. Hinde*, 7 Pet. 270, 273, in point; *Clark vs. Turton*, 11 Ves. 237; *Whaley vs. Norton*, 1 Ver. 484; *Smith vs. Clark*, 12 Ves. 460, in point. In such a case the court will not regard the irrelevant proof.

The complainants put their case upon an executory agreement, but the proof which they exhibit tends to show a parol

gift, void in law. This is a departure. No two things could well be more distinct than a contract and a gift. The one is predicated upon a valuable consideration, the other is purely voluntary; the one may be good under the act of 1806, although in parol; the other, under that act, is void, unless in writing and attested. 2 Kent, 436; *Smith, et al. vs. Yates*, 1 Dev. Law Rep. 302. An agreement to convey will be specifically executed; a promise to give will not. The term "agreed" is a technical term; and synonymous with contracted. There being in the bill no allegation that this agreement was ever executed, or the negroes delivered to the defendant in pursuance of it, to hold for the complainant, if the court should think the last point against us, still, inasmuch as the bill looks to a mere unexecuted agreement, the proof does not sustain the bill. 10 Pet. 208, 209, and authorities *supra*.

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This view of the case is made stronger from the fact, that in reference to the negro boy Sam, the bill alleges a gift expressly, and that the boy was actually placed in the possession and use of the defendant, and has remained there ever since; also a similar allegation, in relation to the other property of a personal nature. Why this vast difference of phraseology, if the pleader did not intend a wholly different case for all the negroes, except Sam?

4. We contend the decree is erroneous, as to all the property, because the proof does not sustain the allegations in the bill. As to all the negroes, except Sam, the complainants not only abandon the case made in the bill, to wit, the agreement and resort to the proof of a gift, but they also depart from the gift; admit it to be void; and seek to recover upon the ground that there was no contract, no agreement or gift, but that the defendant held said negroes in possession, and for the use of the complainant, so long as to give her a title by the statute of limitations, when there is no allegation in the bill that he held said negroes in possession at all, or for the complainant. This is a departure. 10 Pet. 208, 209, and authorities *supra*. As to the boy Sam, the complainants depart from the allegation of a gift, and resort to a title acquired under the act of limitations, when there is no allegation in the bill, how

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or in what character the defendant held, whether as a trustee or not, but rather the contrary, as the bill alleges, that Sam remained in the possession and use of the defendant. The acquisition of property, by the statute of limitations, is quite a different thing from a gift or purchase. A title acquired under the act, depends upon the combined operation of possession and lapse of time; and he who seeks a recovery under it, must allege and prove the facts constituting the bar and title.

2. We contend that, the form of the pleadings aside, the testimony does not sustain the decree. The act of 1806 is emphatically a statute of frauds and and perjuries; and the proof to divest the owner of his property in slaves, even upon the ground of an adverse holding, should be clear, strong, decided, and without doubt. For the decisions upon this act see *Davis vs. Brooks*, 3 Murph. 133; *Id.* 483; *Cotton vs. 2 Powell*, Car. Law Rep. 432; 1 Dev. Law Rep. 302; *Palmer vs. Faucett*, 2 *Id.* 240.

In North Carolina, a possession of a slave for three years, or a longer period, adverse to the true owner, bars the remedy, but does not affect the right. *Skinner vs. Skinner*, 3 Murph. 535. The consequence is, that the doctrine in *Blanton vs. Coulson*, 3 Hayw. 155, 356, holds; a party, therefore, may defend, but cannot assert a right as a complainant, upon the act of limitations. Hence it was necessary for the bill to allege, and the proof to show, a holding in Tennessee adverse to Sallard, and for the use of complainant, for three years.

GREEN, J., delivered the opinion of the court.

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We are satisfied from the testimony in this cause, that the defendant and Sallard, his late wife's father, intended and understood their conversation, after the death of Mrs. McKisick, as a promise on the part of McKisick, to give the negroes to his daughter Eleanor, rather than a gift of them to her, by the old man Sallard.

Sallard himself, upon whose testimony we rely, says, that he put the negroes, Murphey, Ann and Patsey, in the possession of McKisick, shortly after his marriage to the witness'

daughter, without any condition or restriction; and that he gave Sam to Eleanor, defendant's daughter, shortly after her birth. He states that after the death of his daughter, the wife of McKisick, they had a conversation, in which he told McKisick he wanted Eleanor to have the negroes he had put into his, McKisick's possession, and if she should die without an heir, he wanted McKisick to have them. McKisick said he was perfectly willing to have it so. After Eleanor's marriage to complainant, defendant promised witness that when his daughter went to housekeeping he would give her the negroes. This he failed to do, but afterwards offered to buy them from the witness.

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From this statement, we do not understand the old man Sallard as having considered his gift to McKisick as void, because not made in writing, as required by the act of North Carolina of 1806; and that he, therefore, assumed to resume the ownership of the negroes, and make a new gift of them to Eleanor. On the contrary, it appears rather as the expression of his wish, that McKisick should give the negroes that had been considered as her mother's property, to Eleanor. That McKisick so regarded it is manifest, from the fact that he promised to give the negroes, as the old man wished. He considered himself still as the owner, but was willing to gratify his father-in-law, and give the property in the way he desired.

This view of the case is no way important except to explain the character in which McKisick subsequently held possession of the negroes; for we are to presume, unless there be satisfactory evidence to the contrary, that he continued to hold in the character in which he acquired the possession. For this court has decided in the case of *McDonald vs. McDonald*, 8 Yer. 145, in pursuance of the North Carolina decisions upon the construction of the act of North Carolina of 1806, that the mere fact, that a father puts his child in possession of negroes, will not, no matter how long he retains that possession, give him a title to them by the statute of limitations. The reason why the statute of limitations does not run in favor of such possession is, that the property

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is not held *adversely*. The possessor is a mere bailee for the owner; and the possession is that of the owner.

As to three of the negroes now in dispute, we do not think they were ever held in fact by McKisick for his daughter. Sallard, the grandfather, did not give them to the complainant Eleanor, he only desired she should have them, and the defendant promised to give them to her. The very terms they use, that McKisick should give them, shows that the old man did not understand himself as resuming his right to control them, and then as parting with the right in favor of Eleanor. The proof of McKisick's declaration as to Eleanor's right to the negroes, is too loose, unsatisfactory and inconclusive, to authorise us to say that he actually held them for her, adversely to her grandfather.

We think, therefore, that as to these three negroes and their increase, Eleanor acquired no title by the statute of limitations. But as it regards the negro Sam, we are of a different opinion.

This negro was given to Eleanor when she was a child, and was placed in the possession of her father for her. Sallard agreed to part with his right in favor of Eleanor, and McKisick received the negro as hers, and must be regarded as having continued so to hold him. It is absurd to say, that this was not an adverse possession to the title of the grandfather; and if so, it was the possession of Eleanor, for whom it had originally been taken, as there is no evidence to show a change of the character in which it was first held; and, indeed, as that character could not have been changed, had the defendant desired it, she being an infant, and he her natural guardian. This possession had been held for many years in North Carolina, and for more than three years in Tennessee, before the commencement of the suit.

The complainants are therefore entitled to Sam, and to an account for his hire, from the time of Eleanor's marriage.—*McDonald vs. McDonald*, 8 Yer. 145.

Reverse the decree, and decree for the complainants, as herein directed.

MONTGOMERY vs. HOBSON.

HUSBAND AND WIFE. *Conveyance of wife's land—analogy between conveyance, by fine and statutory deed—Constitutional Law—retrospective law when forbidden.*

In the conveyance by *fine*, the conusor's acknowledgment of the conusee's right is the inception of the conveyance. The judgment of the court perfects it.—

From the last principle, it follows that in the conveyance of the wife's land, the acknowledgment of the husband and wife need not be simultaneous, nor by him *before* her.

In the conveyance by statutory deed, the bargainee has an inchoate title by the signing, sealing and delivering. The registration makes it complete. The bargainor's signing, &c. stand in place of the conusor's acknowledgment; and the registration, like the judgment, accomplishes the conveyance. The bargainor's acknowledgment of the signing, &c. does not *further divest* his title, it only authenticates the signing, &c.; and is the register's warrant for admitting the deed to record.

A *feme covert's* statutory deed of her land more closely resembles the *fine*. Her signing, &c. are inoperative till acknowledged in court. Her title is not inchoately divested till the signing, &c. are acknowledged. The acknowledgment is the first act which has legal effect, but when made the deed takes effect from the signing.

Feme Covert's deed how executed. From the principle that it is the husband's signing, &c. which passes his right, and the wife's acknowledgment which passes *hers*, it follows that her acknowledgment, when made in a court having the right to take it, is good to divest her title from her signing, &c. by relation; whether her husband is present to acknowledge at the same time, or absent and ignorant of the transaction; and though he never acknowledged his signing, &c.

Retrospective Law. From the principle that the bargainor's title is inchoately divested by the execution of the deed, and that the acknowledgment or probate of the execution has not effect further to divest it, but only entitles it to registration, it follows that statutes validating imperfect acknowledgments and probates, are not unconstitutional though retroactive, because they do not affect rights, but only evidence of facts.

CHANCERY. *Deed when cancelled for fraud or surprise or not.* To set aside a *feme covert's* deed of her land on the ground of surprise in her privy examination, whereby she was induced to acknowledge her signing, &c. unadvisedly and improvidently, the proof should be clear, credible and satisfactory, especially after the lapse of twenty years.

The state of North Carolina, by patent, No. 380, dated July 26, 1793, granted to Euphemia Parnell, six hundred and forty acres of land on Cumberland river, opposite Nashville. The grantee was at the date of the patent, quite young, and soon afterwards removed from Nashville to Wythe county, Virginia, in company with her mother, upon whose pre-emption right the grant was founded. In Wythe, Euphemia intermarried with Hugh Montgomery. On the 12th of April, 1797, Montgomery and his wife joined in a deed of convey-

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ance of the land to one Moses Austin. Two days afterwards, she was privily examined in Wythe county court, as the record has it, "respecting her *dower* in said land," her husband having already acknowledged the deed in said court; and she acknowledged that she was "willing that said deed should be recorded in the county court of Davidson," Tennessee.—Austin conveyed the land to one Sandford, who, on the 25th of October, 1797, conveyed it to William Hobson. The deed from Montgomery and wife, however, remained in the condition above described, till the 11th of December 1807, when it and the privy examination taken in Wythe, which had been endorsed upon it by the clerk, were registered in the register's office of Davidson.

On the 4th of March, 1814, Lemuel P. Montgomery, the eldest son of Mrs. Euphemia Montgomery, made his last will and testament, making certain dispositions for the support of his mother and her family, and for the education of his brothers, she and they having been reduced by the improvidence of Hugh Montgomery, to a state of great destitution. James Trimble, Jenkin Whiteside and Thomas McCorry were appointed executors of this will; and it was enjoined upon them to protect and advise the testator's family. He was slain in the battle of Tehopeka, on the 27th day of March, 1814. Immediately afterwards Trimble and Whiteside proved the will, and took upon themselves the trusts thereof.

In 1816 William Hobson died, having made his will, in which he devised the lands above mentioned to his three sons, John, William and Nicholas. The last, in the fall of 1817, employed Trimble to procure the privy examination of Mrs. Montgomery, who then resided in Campbell county, Ten. with a view to the registration of the deed anew in Davidson. Trimble placed the deed, for that purpose, in the hands of James M. Campbell, Esq. of Kingston, who had habitually acted as the attorney and counsellor at law of Mr. and Mrs. Montgomery. On the 3d of December Mr. Campbell applied to Mrs. Montgomery to go into the county court of Campbell, then in session, to make the acknowledgment. Montgomery was then absent from home on a journey, and had been for some months. To McCampbell "she did not appear to un-

understand any thing about it, and said that she did not know what interest she had in the land claimed, and seemed unwilling to acknowledge the deed." She sent to her son-in-law, Charles Masey, to inform her about it. Masey said that he could give her no information on the subject. However, she made the acknowledgment of record,—it was endorsed by the clerk on the deed, and duly certified, and the deed, with its endorsements, was again registered in the register's office of Davidson, on the 20th of May, 1818; and the third time, on the 4th of July, 1834.

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Hugh Montgomery died on the 3d of June, 1833, and Mrs. Montgomery in January, 1834, intestate.

On the 16th day of December, 1834, an action of ejectment had been commenced in the circuit court of Davidson, by the heirs at law of Euphemia Montgomery, against the persons in possession of the land, being the devisees of William Hobson and those claiming under them. Pending this action of ejectment, namely, on the 24th of May, 1834, the lessors of the plaintiff in the ejectment, filed their bill in the chancery court at Franklin, against the defendants in the ejectment, stating the facts above recited; charging that the deed of April 12, 1797, and especially the privy examination of Mrs. Montgomery of December 2nd, 1817, were obtained by fraud and surprise, and were void; and that the defendants ought to be enjoined from reading said deed in their defence to said action; that it ought to be delivered up and cancelled as fraudulent and void; and praying for relief accordingly.

The defendants severally filed their answers, in which the title of William Hobson was deduced from Euphemia Parnell, as above stated. But they insisted that William Hobson was a purchaser, without notice of any claim or title whatever to said land, by any other person or persons, except Sandford, his vendor, to whom he gave for it 2400 dollars, a full and valuable consideration. They averred that Hobson had, immediately after his purchase, taken possession of the land, which possession had been continued till the time of filing the answer, and they relied upon lapse of time in bar of the relief prayed for in the bill. They denied that any advantage had been taken of Mrs. Montgomery, or any fraud committed

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upon her rights, or that she was surprised or inveigled into the privy examination complained of. They insisted that by the act of 1822, c. 12, the deed of April 12, 1797, of Montgomery and wife to Austin was good and valid to pass his title to the land, that the same was also valid by the act of 1807, c. 35; that as to Mrs. Montgomery the deed was valid by the acts of 1715, c. 28, 1751, c. 3, 1813, c. 79, and 1821, c. 61, whereby they had a good, perfect and legal title in fee simple to the land. They also relied upon the various acts of limitations of the states of North Carolina and Tennessee of 1715, 1797 and 1819, they and those under whom they claim having been in possession of the deed, claiming it in fee simple, more than thirty years before the commencement of the suit.

There was in the record a large mass of irrelevant testimony, relating to points which were not discussed by counsel or noticed by the court. The testimony relative to the privy examination of 1817, consisted of the depositions of James McCampbell and Charles Masey, both of which are stated in substance in the opinion of the Supreme Court.

The cause was heard by Chancellor BRAMLITT at October Term, 1838; and his Honor being of opinion that the privy examination of 1817 was obtained by surprise, and was made unadvisedly and improvidently, and was consequently not binding in law or equity, upon Mrs. Montgomery or her heirs; that the deed as executed in 1797, did not divest her of title, and had not been by subsequent legislation invested with that efficacy, ordered it to be delivered up and cancelled, and enjoined the defendants from setting it up against the complainants, or those claiming under them, and from reading it on the trial of the action of ejectment.

The defendants appealed in error

January 9 & 10.

NEIL S. BROWN, W. BROWN, COOK and MEIGS, for the complainants, said—1. That the deed of April 12, 1797, was the act of the husband only. Co. Litt. 326a. At common law, the husband's feoffment of the wife's land, was a discontinuance, and put the wife to her action of *cui in vita*. Litt. § 594. The statute of 32 H. 8, ch. 28, sec. 6, which is in force in Tennessee—see Martin's Statutes, 127, 2 Sts. at

Large 291, Ruffhead's Ed., altered this rule of the common law, by providing, in substance, that the husband's alienation should do no more than convey his interest. 10 Johnson's R. 345; 20 Johns. R. 301; 3 Monroe 245. Montgomery
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Though Mrs. Montgomery signed this deed, and was examined in Wythe county court, yet, for two reasons, this signing and examination are inoperative and void. 1. Because, on the face of the certificate of examination, dower only purports to be conveyed. 7 Monroe, 661. 2. Because there was then no law of Tennessee authorising such privy examination.

2. The privy examination of December, 1817, in Campbell county court, was also inoperative and void—Because the husband was absent, and there was no legal evidence before that court, that the paper presented was his deed.

To make that deed with the privy examination operate the translation of the fee to Moses Austin—the husband must have been present—2 Kent, 150 to 154—and must have joined his wife in re-executing it. What is an effectual *joining* of husband and wife to bar her of her dower, or transfer her fee, see discussed by Parsons in *Fowler vs. Shearer*, 7 Mass. R. 14; and by Story, 3 Mason, 349 to 358; 4 Mason 283; 5 Mason 67. In these books the reason is assigned why the husband and wife must join in the act; that is, both be present, giving a simultaneous assent. But the reason is given in the concrete. Kent gives the reason in the form of an abstract proposition, deduced from those cases and others.

The void and inoperative deed, and privy examination of April 12, 1797, cannot be helped by the relation of the examination of 1817 to it—*Jackson vs. Stevens*, 16 Johns. 110; *Doe vs. Howland*, 8 Cowen, 277—because being void, there was no legal entity to which it could relate, and, as an independent act, it was void for want of the husband's concurrence.

3. But much the strongest reason why the examination of 1817 is inoperative, is to be found in the words of the acts of 1715, ch. 28, and 1751, ch. 3, which, duly considered, have but one sense, and that sense is, that the husband and wife

Montgomery must join or concur in the same simultaneous act, which, when analyzed, consists of the following parts:

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1. The husband and wife present themselves to the court, and their purpose to execute a deed to convey her estate is announced. 2. The deed is produced bearing their signatures respectively. 3. The court directs one or more of its members to examine her apart from her husband, to ascertain whether her assent was voluntary, &c. 4. The result is announced to the court. 5. And thereupon, the joint acknowledgment of the husband and wife is taken before the court.

These several acts being done, all the words of the statutes are satisfied. See 3 Dev. 319, 320. To this purpose, a host of authorities may be adduced, some of which are the following:

NORTH CAROLINA.—*Whitehurst vs. Hunter*, 2 Hayw. 401; *Robison vs. Barfield*, 2 Murphy, 390; *Burgess vs. Wilson*, 2 Deaveraux, 306, how the deed is to be acknowledged; *Cloud vs. Webb*, 3 Id. 317; *Barfield vs. Combs*, 4 Id. 514, manner of proving the deed particularised; *Fenner vs. Jasper*, 1 D. & B. 34; *Lucas vs. Cobb*, 1 Id. 228; *Sutton vs. Sutton*, 1 Id. 582; deed is first to be proved as to both husband and wife, and then her private examination is to be had, &c.

SOUTH CAROLINA.—*Hillegas vs. Hartley*, 1 Hill, 106.

MARYLAND.—*Lewis vs. Waters*, 3 Harris and McH. 430; *Robins vs. Bush*, 1 Id. 50; *Hammond vs. Brice*, 1 Id. 322; *Webster vs. Hall*, 2 Id. 19; *Flanagan vs. Young*, 2 Id. 38.

VERMONT.—*Harmon vs. Taft*. 1 Tyler 6.

KENTUCKY.—3 Monroe, 245, *Deathridge vs. Woodruff*; 7 Monroe, 661, certificate as to dower, similar to Clerk of Wythe's certificate; 2 J. J. Marshall, 359; 3 Id. 243, 244; 3 Dana 289, *Millar vs. Shackleford*—a very important and well reasoned case. Effect of husband's alienation of wife's land. Re-delivery by wife after discovery. See on this last point 9 Serg. & R. 276; 5 Serg. & R. 535.

NEW YORK.—10 Johnson's R. 435; 16 Id. 110; 20 Id. 301; 8 Cowen, 277.

They also insisted that the privy examination of Mrs. Montgomery, in 1817, was improvidently obtained; and upon this

point they relied chiefly upon the case of *Evans vs. Llewellyn*, 1 Cox, 333, to which purpose they also cited 1 Story's Eq. § 120, 251; 2 Sch. & Lef. 456, 462; *Wright vs. Cadogan*, 2 Eden, 239; 2 Story's Eq. 1391-2-3, 1265; 1 Vernon, 19, note as to case in Cox; Id. 32; 6 Ves. 338; 14 Id. 215. They said it was not necessary to show in such a case that there had been actual fraud, circumvention and deceit.—No inveigling was necessary. It was sufficient if the woman was not duly and fully informed; if she was hurried into the business; if she did not consult her friends capable of advising her. And they strenuously insisted that the case in Cox, was, by many degrees, a stronger case than *Mrs. Montgomery's*. Montgomery
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They went into a critical examination of the several statutes relied upon in the defendant's answer as validating their title, with the view of proving that none of them could have that effect.

E. H. EWING, S. H. LAUGHLIN, JAS. CAMPBELL, and F. B. FOGG, for the defendants, said—It is true there was no law in existence at the time authorising the acknowledgment in Wythe county, but since then the following statutes have been passed, making valid that acknowledgment so far as Hugh Montgomery was concerned, viz. the act of 1797, c. 43; 1807, c. 85; 1822, c. 12, and if these acts do not apply to the acknowledgment of Euphemia Montgomery, at least the act of 1821, c. 61, does apply to it. These acts, though retrospective, are not void or unconstitutional, they only change the rules of evidence, but do not affect the rights of parties; they contain provisions in favor of subsequent purchasers, who would, at all events, be protected without such provisions. But the two first are said not to be retrospective by their terms; we think, however, that they are, as will fully appear from their scope and incidents. The third, it is admitted, is retrospective by its terms, and makes the deed good as to Hugh Montgomery if constitutional; as to its constitutionality see Cooke's Reports, 431; 1 Yer. 13; 2 Ten. R. 345; Peck's R. 17, 266; 1 Kent's Comm. 456; 16 Mass. R. 245; 8 Peters, 88; 16 Serg. & R. 35; 10 Serg. & R. 25; *Mercer vs. Watson*, 1 Watts, 330; *Langhorn vs. Hobson*, January 11, 12.

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4 Leigh, 224; *Todd vs. Baylor*, Id. 498. It is said, however, that if the act of 1822 does make Hugh's acknowledgment valid, that it makes it valid only from the date of that statute, and does not relate so as to authorise the acknowledgment by the wife before the Wythe county court, that court at the time having no power to take either the probate or acknowledgment of the husband, and therefore having no legal evidence of his assent to the wife's deed; so that supposing the act of 1821 to make, in proper cases, the examination of a *feme covert*, previously taken, good, yet that this examination was improperly taken for want of the only legal evidence of the husband's assent. We answer, that when the act of '22 makes the acknowledgment of Hugh good, it is, except as to subsequent purchasers, as if that statute had been passed previous to the act that it confirms, and conferred the authority incident to its enactments. It is said though, that if Hugh's acknowledgment be valid, and does relate so far as his assent is concerned, that still the court of Wythe had no power because of his assent merely to take this acknowledgment; to this we say that her acknowledgment was confirmed and made good by the act of 1821, c. 61. This statute, it is said, relates only to acknowledgments in the state; we say the words are general, and provide for the cases of acknowledgments by *femes covert* every where in the United States, though the previous part of the statute provides only for cases of probates or acknowledgments in the State, and for the reason, that the cases of probates and acknowledgments by others out of the State, was already provided for, and that of *femes covert* was not.

Again, we say that if this probate in 1797 was defective, the acknowledgment of the *feme* in 1817 remedies the defects. This was not good say our opponents: 1st. Because the husband and wife did not acknowledge together, and the husband was in fact absent, and they refer to the mode of acknowledgment in fines, and to a case in 2 Devereux's Reports, decided upon the acts 1715, c. 28, and 1751, c. 3. We say that the practice upon fines should not be quoted, as it was to get rid of the difficulties [of that mode of passing

estates that our acts were passed. But let us see what was the mode of acknowledgment in fines, 4 Comyn, 308-9 and note; 5 Cruise, 87, and what absence is meant. The case in Devereux does not apply. But the act of 1813, which speaks of probate or acknowledgment, rids us of this difficulty, as it manifestly contemplates, in some instances, the absence of her husband, and always where a commission is to be sent, he may be absent; but why be present, and how near? His assent is shown by previous acknowledgment or probate, and the object of these laws is to protect the wife against the wiles or violence of the husband, and not against the fraud or force of others; his absence is expressly required upon the privy examination, and how would his presence avail her? Against whom? But say the gentlemen, at least the probate must be in the same court, and why? If a legal probate be made, it is a record and imports the truth; it carries the estate of the husband. If the husband's presence is not necessary, the evidence of his assent was as strong by the Wythe county record, as it would have been by our own. See as to probate's acknowledgments by *femes covert*, 4 Randolph, 468; 1 Yer. 413.

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It is urged here also again, that the probate in Wythe not being legal in 1817, as to Hugh Montgomery, the Court of Campbell had no evidence of the husband's assent, and no authority to take the acknowledgment. We say that it was legalized by the acts of 1797 and 1807, and that if this were not so, that the act of 1822 had a retroactive effect, and made it good from its date, both as to this and for all other purposes, except as to subsequent purchasers, and reiterate our argument in regard to the wife's acknowledgment in Wythe. Then, we conclude that no valid objection can be made as to the form of this probate and acknowledgment.

The charge of fraud, or surprise, contained in the second objection to our deed, is about such an one as might be made in regard to the deed of almost any *feme covert*. That women have been, and always will be, ignorant of business, and their rights too, may be in some measure expected while the present state of society exists, and that even after the most studied explanations; their education, and the situations they are expected to occupy in the community, naturally abstract them

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from the bustle and concerns of busy life. When we come, then, to decide upon their acts, we must do so in reference to this state of things, otherwise the safeguards intended to be thrown around them may be made instruments for the accomplishment of the most extensive and glaring injustice. They are permitted to act, and those acts cannot frequently be examined into for a great length of time after they have taken place. If then for their benefit, or that of their heirs, we are to extinguish space and time, and adhere to the ordinary rules that apply to the transactions of men, which are speedily inquired into, we may uproot the very foundations of the rights of property. Are we to look back through a vista of time, and regard the objects there seen as if immediately before our eyes? Are we, contrary to our common sense, to look at women as we would at men, and require of them in the transaction of business, the same unhesitating promptitude and activity. If we are, it will throw great obstacles in the way of that free and unrestricted transfer of property which it has been the object of our institutions to advance.

This surprise, or fraud, is alleged to have taken place twenty years ago, and for its proof depends on human testimony. Will this court look at the transaction as one of yesterday? No statute of limitations, to be sure, applies, nor ought lapse of time, if the wife had not joined in the deed, and by not doing so, kept those in possession always on their guard. But by joining she has encouraged improvements, prevented perpetuation of testimony, and, in fact, perhaps permitted the real truth to escape through deaths and the infirmity of human memory. She did not complain, and certainly was not prevented from taking steps by the husband, "who," says the bill, "though he would not sue, yet was not unwilling that others should." Married women are not protected in frauds, and her silence during all this time has certainly effected a gross injury to these defendants, who were all this time improving, buying, selling and building hopes upon this land, wasting upon it sweat and toil sufficient to have made competent fortunes perhaps, in some other quarter.

Under the circumstances of this case, it would seem, that the general rule of law should apply; at least that without

strong evidence the court will not impute fraud, after a great length of time. See *Charter vs. Smith*, 3 Dessaus, 12; *Meredith vs. Nichols*, 1 A. K. Marshall, 600; *Shelby vs. Shelby*, Cooke, 181; 2 Sch. & Lef. 56. What testimony may we not have lost? Trimble is dead, the justices of the county court are not to be had, and if so, the matter may have totally escaped their recollection; any one who saw or heard Mrs. M. speak of this matter is not now within the reach of defendants, in fact, all the objections apply here that ordinarily do to charges of stale frauds. But let us look at this as a charge of fraud or surprise of a late date, and see then how the matter appears. The witnesses, to prove the surprise, are first, McCampbell, a witness, according to the proof, with impaired faculties and memory, and second, an interested witness at least to the extent of getting a fortune for his children. What they have proved so far as it is to be relied on, with the make weights to be added to their proof will be examined in argument. Take it altogether and apply it to this case as one of yesterday, and we do not think it sufficient to make out a case of surprise, even suppose that Mrs. M. had been there making the bargain for her land. The case in 1 Coxe, 333, is stronger than this, and has the ingredient also of gross inadequacy of price. See 1 Story's Eq. 132, and 254-5 6, and note. Here was a full consideration, at least such is the presumption, there being no proof to the contrary.

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But the charge of fraud is not here, that she was cheated in a bargain or surprised out of her property in a trade; but that being ignorant and hurried she made an admission of what she had previously done. Did her surprise or ignorance tend to make her state an untruth? I suppose not; then they might have existed and been perfectly harmless. What is an acknowledgment of a deed by a *feme covert*? It is an admission of record of what had been previously done. It is a mode of proof. To be sure it is the only mode of proof of her deed, still it is but proof at last. How does it speak, not in words of the present but of the past? The *feme* does not *now* pass her estate, she says, "I *have* signed, sealed," &c. The proof is guarded, in regard to her, and no one

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shall report her, she reports herself; but her acknowledgment does not differ in fact from her husband's. He in effect says, I did this freely, and there is no suspicion thrown upon that, then the end of the law is answered if that be proved by legal testimony. I can well suppose cases where an acknowledgment would be invalid for fraud. Threats and promises might induce a falsehood, mere imbecility might. But Mrs. M. acted "with fear, care and thought." If she recollected the fact that she did sign and seal this instrument freely, and so stated it, it is all sufficient. It is attempted to affect this view of the case by some New York decisions. 16 Johns. 110; and 20 Johns. 301. But these cases do not sustain the gentlemen, 1st. because the statute of N. York is totally different from ours; see 3 Sheppard's Touchstone, 190; and 2nd. because they decide merely that the deed does not take effect until acknowledgment, or does not relate to its date; there are some *obiter dicta* which may or may not be true under the statute of that state. But under our statute, we say, that signing and sealing are part of the transaction, by which a married woman transfers her estate. That at least the transfer is inchoate when the *feme* comes into court, and that the remainder of the transaction requires only recollection, veracity, and freedom from fear, and that if these exist, fraud cannot be predicated of an acknowledgment by a married woman. Upon the whole, therefore, we conclude, that the deed and probate are valid in form and are not affected by fraud or surprise.

The case in Taunton's Reports, p. 37, referred to by Mr. Meigs, was the case of an assignment by operation of law, the husband being a bankrupt, and as to him of course *in invitum*. And his assent was not given, so that he might enter and bar the fine—there was no fine, no acknowledgment by the husband, nor any joining of any kind by husband and wife.

TURLEY J. delivered the opinion of the court.

January 21.

This bill is filed by the complainants, the heirs at law of Euphemia Montgomery, to have a deed of bargain and sale executed by her and her husband, Hugh Montgomery, to

Moses Austin, for a tract of land containing six hundred and forty acres, lying in Davidson county, State of Tennessee, the same having been her individual property, delivered up to be cancelled, they contending that the same is void, because it was never executed according to the forms of law, or if it were, that it was so procured to be done by fraud and surprise.

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The facts of the case are shortly these. Euphemia Montgomery was the legal owner of the tract of land in dispute by a grant from the State of North Carolina, issued to her in her own name, and being such owner, she, in conjunction with her husband, did on the 12th day of April, 1797, in the county of Wythe, State of Virginia, the place of her residence, execute a deed of bargain and sale for the same to Moses Austin, for the consideration as therein expressed of six hundred and forty dollars. On the same day this deed of conveyance was acknowledged by her husband, Hugh Montgomery, in the county court of Wythe, and a commission directed to take her privy examination as to the relinquishment of her right of dower in the land sold. This commission never issued, but on the 14th day of April, 1797, she came into said court and was privily examined in which examination she acknowledged that she was willing that the deed of bargain and sale to Moses Austin should be recorded in the county court of Davidson, State of Tennessee. In this situation this deed of conveyance remained until the December Term, 1817, of the county court of Campbell county, State of Tennessee, when at the instance and request of Nicholas Hobson, one of the defendants, she in the absence of her husband went into open court and acknowledged that she had executed said deed freely, voluntarily and without compulsion from her husband.

The reasons upon which this deed of conveyance is sought to be cancelled, are resolved into the propositions. 1. That it has never been executed as the law directs, and has not therefore passed the estate, and 2. That if it be, such execution was acquired by fraud and imposition, advantage having been taken of a *feme covert*, in procuring the acknowledgment of the deed in the absence of her husband.

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In the decision of the first proposition, it is necessary to ascertain what are the rights of a *feme covert* to her real estate, and how she may part from it? The lands of a wife belong to her, notwithstanding her coverture, the husband having acquired nothing but the right to receive the rents and profits during the marriage, and a contingent tenancy by the courtesy, provided he survive her. By the provisions of the common law, this right of the wife can only be conveyed by the assurance of a fine, or common recovery,—her deeds of every kind and description being held to be absolutely void. The reason for this distinction between the modes of conveyancing, obviously results from the fact, that the wife is under the power and protection of her husband, and is therefore supposed to have no controlling will of her own, and therefore cannot protect her estate from his rapacity, if she were permitted to convey it, by the ordinary forms of assurance, inasmuch as they are executed privately, and of consequence there can be no certainty that she has acted freely and voluntarily, and not by his compulsion.

But inasmuch as this disability to contract, so as to bind herself, does not arise from a want of discretion, but because of her social obligation to her husband, she is permitted to do so, where her rights can be protected, and when reason and justice dictate a departure from the rule. Therefore she may dispose of her estate by fine or recovery, they being conveyances of record, which cannot be passed, but by her consent, ascertained by the examination of the court, before which the proceedings are instituted. Nevertheless, to constitute a valid conveyance by fine and recovery, from a *feme covert*, the husband must be a party thereto, because of his limited rights in her estate, and because he is her legal protector against fraud and imposition. We then have the examination of the wife by the court, as to her consent to the disposal of the estate to protect her from the undue influence or violence of her husband; and the consent of the husband, as expressed by his joining with his wife in the assurance, to protect him from a destruction of his right in her estate, and to secure her against the fraud and imposition of others.

This is as it should be. It is not the policy of a well re-

gulated community to tie up estates, or to place any restrictions upon their disposal, except such as may be necessary to give a fair protection to the owners against any undue advantage which may be obtained against them, either by fraud or the influence which the nature of such relations as husband and wife, guardian and ward, trustee and *cestui que trust* may bring to bear.

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The mode of conveyancing by fine and recovery, being in form an action brought for the recovery of the estate, it of necessity follows, that the acknowledgment of the husband and wife, that the land belongs to the complainant must be in the same court; but it by no means follows, and indeed it has never been determined, that the acknowledgement must be simultaneous, or that the husband must give his, before his wife. Indeed the sense of the thing is otherwise. It being a suit, the acknowledgment is in the nature of a confession of judgment; and the husband and wife being joint defendants, it can make no difference, which confesses first, so that the confession be made, by both, while the suit is pending. Though there is a case or two in which the courts of England have permitted, under particular circumstances, a *feme covert* to levy a fine without her husband, *quantum valeat*; yet it is not denied, nor could it be, that as a general rule the husband must be a party thereto, or it will not be binding even upon the wife or her heirs, unless it were levied by her as a *feme sole*.

Such are the rights of a married woman as secured to her by the common law; but the assurance by fine and recovery having never been used in North Carolina and Tennessee, there is no mode by which a *feme covert* in this state can dispose of her real estate, except that which is provided for by the statute.

The first statute on this subject was passed in 1715, c 28, Scott's Revisal, 15. It provides, "that all deeds made by husband and wife, and acknowledged before the chief justice, or in the court of the precinct where the land lieth, the wife having been first privately examined before the chief justice, or one of the associate judges, or by some member appointed by the court of the precinct, whether she

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This statute substitutes a deed of bargain and sale in the place of a fine and recovery, and authorises an acknowledgment of it either before the chief justice personally, or in the court of the precinct where the land lies. But it has made no alteration whatever as to the security given mutually to the husband and wife, by a joinder in the conveyance and by the privy examination of the wife, as to her voluntary assent thereto.

The power to receive the acknowledgment of the deed and to take the privy examination of the wife, being confined to the person of the chief justice, or the court of the precinct, the statute was found to be too restricted in its operation, and to produce evil, for remedy of which the act of 1751, c 3, was passed, by which provision was made, that when the deed had been acknowledged before the chief justice, or in the court of the county, by the husband, or proved by the oath of one or more witnesses, and the wife should be a resident of any other county, or so aged and infirm, that she could not travel to the chief justice, or the county court to make her acknowledgment, a commission might be issued for that purpose. This statute made no other alteration of the act of 1715, c 38, than to authorise a commission where the wife was a resident of another county, or was so old and infirm as to be unable to attend upon the chief justice or the county court. It still left the power to receive the acknowledgment of the deed, and to take the privy examination of the wife either personally or by commission exclusively in the person of the chief justice, or in the court of the precinct.

This amendment, time and experience proved had not gone far enough in removing the restrictions upon the right of a *feme covert* to alien her lands; and the act of 1813, c 79. was passed, by which it is provided, that "it shall and may be lawful to take the probate and acknowledgement of deeds made by husband and wife, for the sale and transfer of land belonging to the wife, before any court of record in this

state; and when said grantor resides beyond the limits of this state, before any court of record in another state or territory." It is under the provisions of this statute that it is asked that the deed from Mrs. Montgomery shall be held to be good, and operate to convey her estate to Moses Austin.

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It is not pretended that the deed can be supported by her acknowledgment made in the court of Wythe county, Virginia, in 1797; but it is contended, it can upon the acknowledgement made, in the county court of Campbell, in December, 1817. It cannot be successfully denied that the form of the acknowledgment made in the county court of Campbell, is in strict conformity with the provisions of law, and the only question is, whether the court had the power to take it. It is urged with great strength and ability that it had not, because it is said that by the act of 1813, c 79, no power is given to the court either in or out of the state, to take the private acknowledgment of a *feme covert* to a conveyance of her real estate, unless the deed shall have been previously acknowledged in the same court by her husband, or proven by the subscribing witnesses, which was not done in this case.

There is nothing in the wording of this statute, which requires such a construction; and if it has to be given, it must be upon the ground of analogy between her rights, as they existed at common law, and under the statute; or that she is to receive some substantial protection thereby.

There is nothing by analogy requiring such a construction.

We have seen that a *feme covert* cannot levy a fine but in connexion with her husband, and that *he* must acknowledge the right of the cognizee to the land, as well as his wife, and in open court; but that there is nothing which makes it necessary that this should be done by them simultaneously, or by him before her, and that there can be no good reason why it should be so. In the case of a fine, it is the judgment of the court upon the acknowledgment of the husband and wife, as to the right of the cognizee, which constitutes the conveyance; and therefore, unless *he* has made the acknowledgment there is no conveyance as to him. But when the conveyance is by deed, the execution by the husband is a joinder

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with the wife in the contract, and an acknowledgment of the rights of the vendee in the estate, and must be good without further acknowledgment on his part, unless such acknowledgment be expressly made necessary by statutory provision; and then no greater strictness will be required in making it, than such as a fair construction of the statute, according to its spirit, demands. That the estate, so far as the husband is concerned, passes from him by his execution of the deed before probate or acknowledgment, is unquestionably true, as has been determined by this court in the case of *McNairy vs. Vance*, 3 Yer. 171, and *Turner vs. Shields*, 10 Yer. 1, and by the supreme court of North Carolina in the case of **Morris vs. Ford*, 2 Dev. Eq. R. 412.

This estate is inchoate before registration, but may at any time be perfected by registration; to do which, all that is necessary is, to prove the execution of the deed by the subscribing witnesses, or to procure an acknowledgment by the bargainor. It is then the registration, and not the probate or acknowledgment which perfects the title. Then so far as the rights of the husband are concerned, there is no actual necessity for an acknowledgment, his interest having passed by the execution of the deed. Why then should it be required? Not for the protection of the wife, the joinder of the husband in the deed protects her against the acts of others, and the privy examination protects her against him. Then the acknowledgment of the deed by the husband has no necessary connexion with the conveyance and acknowledgment by the wife; and upon principle cannot be required by any thing short of positive enactment.

The statute of 1813 authorises the probate and acknowledgment of deeds made by a husband and wife, before any court of record in the state, or out of it, if the bargainor resides beyond its limits; and we can see no good and sufficient reason for saying, that they may not be proven or acknowledged as any other joint deeds.

* This case is referred to in *Shields vs. Mitchell*, 10 Yer. 1, in the argument of counsel and in the opinion of the court, as being reported in 4 Dev. Law Reports.

But it is not necessary for us to determine, whether a deed which has not been acknowledged by the husband, or proven by the subscribing witnesses, can or cannot be obligatory upon the wife, she having acknowledged the execution on her part, with all the formalities required by law; because we are satisfied, that if an acknowledgment by the husband be necessary, and it has been made under the provisions of any law authorising it, it will, under the act of 1813, give power to any court of record in the state, to take the privy examination of the wife. Unless we stick in the bark in the construction of the statute this must be so. It is the substance of things and not forms that we are in pursuit of; and as Judge Yates, in the case of the *Lessee of Watson vs. Bailly*, 1 Binny, 479, has observed, "We do not take a literal strict adherence to the very words of a statute, to be essentially necessary in these cases; but the substantial requisites, by which the rights of married women are intended to be guarded by the legislature, should be preserved." These rights are as well guarded by permitting the husband to acknowledge the deed in one court, and another to take the privy examination of the wife, as by requiring both transactions to be done in the same court.

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But it is said, that Hugh Montgomery never acknowledged the deed in any court having jurisdiction to receive it.

His acknowledgment was made in the county court of Wythe, being a court of record, and it is properly certified; but this acknowledgment was made on the 12th day of April, 1797, at a period of time when there was no law authorising it, and it is contended that it is therefore void and inoperative. Though this deed was thus acknowledged in 1797, yet it was not registered in Davidson county till December 11th, 1807; and on the 30th day of November, 1807, an act was passed by the legislature of the State of Tennessee, by which it was provided, "that all conveyances for the transfer of real property, which should be thereafter exhibited for registration, shall first have been proven or acknowledged in the case of resident bargainors, in the court of the county or district where the land, or a part thereof lies; and in the case of non-residents, in some court of re-

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cord in some one of the states, or territories of the United States."

The words, "shall have been first proven," it is contended, gives the statute a retrospective operation, and makes good the acknowledgment of 1797: and so we think. When the deed was offered for probate, it had been acknowledged in a court of record in the State of Virginia, by the bargainor, who was a non-resident, and therefore it fell within the express words of the statute, and was properly registered. We are therefore of opinion, that the deed of bargain and sale from Hugh Montgomery and his wife Euphemia to Moses Austin, has been executed according to the forms of law, and passes the estate.

But it is contended, 2. that the acknowledgment of Mrs. Montgomery which was made in the year 1817, in the county court of Campbell, is bad for two reasons. 1. That it was procured in the absence of her husband. 2. That it was procured by imposition and surprise.

There is nothing in the first objection, the absence of the husband is the very thing contemplated by law; and to require him to go to the court with her, in order that she may be there separated from him, is a refinement in argument that we cannot understand. He must be away from her; and whether the distance be a hundred yards, or a hundred miles can make no difference in principle. The idea, that he must be present to protect her from imposition is not supported by reason. He must join in the conveyance, and this is supposed to be a sufficient protection so far as other persons are concerned; but when she comes to be examined, as to her having voluntarily made the conveyance, it is as against him that she request protection, and not others.

2. Upon the second objection there is more difficulty. The acknowledgment of a deed in 1817, by Mrs. Montgomery, appears to have been made somewhat hastily. But from the view we take of the testimony, we do not think that a case of fraud or surprise is satisfactorily made out. There are but two depositions which bear upon this point.

The first is that of James McCampbell, Esq., who had sometimes transacted professional business for the family.

He states that the deed was given to him by James Trimble, to procure the acknowledgment of Mrs. Montgomery. When at court, in the county of her residence, Campbell, he went to her house, and stated his business. She said she did not know the interest she had in the land—seemed unwilling to make the acknowledgment, and sent for her son-in-law, to advise with. He was unable to give her any information on the subject.

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Mr. McCampbell further says, that he thought she had only a dower interest in the land. As the law has ever stood in Tennessee, her being a party to the deed at all in the case supposed, would have been not only unnecessary but embarrassing; and, with the deed in his hands, which showed where the land lay, no lawyer could have entertained and acted upon such a supposition. His impression must have been based upon a confused recollection of a long past event. But he does not prove that he told her, Mr. Trimble wished her to acknowledge the deed. He does not state, that she said any thing on the subject of her husband's absence, or of her wish to postpone the matter. The only thing material in his testimony is stated in these words: "I am *now* under the impression, that I told her if she did not acknowledge the deed, the claimants might file a bill and enforce the title." And upon the cross examination, when the point recurs, he uses the same guarded phraseology. "I *think* I told her that the complainants might file a bill." It is obvious that the witness feels some doubt whether this communication was in fact made to Mrs. Montgomery. Indeed, if he had thought her interest one of dower only, in her husband's land in Tennessee, he must have known that the acknowledgment and the bill to enforce it would have been alike useless.

The other witness is Charles Masey. He is the father of some of the complainants, his deposition, on the face of it, shows a very strong leaning in favor of the side which calls him.

The state of Mrs. Montgomery's mind, he swears, was such, at the time of the acknowledgment, as to make her incapable of performing any important act. In this he is con-

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tradicted by McCampbell, by the clerk of the court, and by a host of intelligent witnesses, the immediate neighbors of Mrs. Montgomery; and sustained by no person whatever. He states conversations of McCampbell, not proved by him. He affects to have believed the deed in question related to the estate of Lemuel P. Montgomery, which opinion the deed itself would have at once removed; and it is intrinsically difficult to believe that under the circumstances spoken of, he should have been ignorant of its contents, or should not have read and examined it.

Upon the whole, we regard this witness as occupying such a relation to the parties, manifesting so strong a bias, so involving himself in his statements, and so contradicted by others, that his testimony, standing as it does alone on this point, will not justify us, in relying upon it, for the purpose of setting aside the deed.

Besides, it may be remarked, that after the lapse of twenty years, proof to have the effect, claimed for that we have commented on, ought to be clear, credible, and satisfactory; otherwise, the most solemn assurances might be rendered null and void by the vague and perplexed recollection of one witness, and the strained and doubtful statements of another.

We are therefore of opinion, that the complainants are not entitled to the relief sought; and that the decree of the chancellor be reversed and the bill dismissed.

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PLEADING. *Counts* requiring different pleas and judgments cannot be joined. 1 Chitty's Pl. 208; 16 Johns. R. 146; 2 Saund. R. 117.

SAME. *Counts in tort or contract.*—Where a contract creates the defendant's duties and obligations, and he is sued for a breach of them, whether counts assigning such a breach, are in contract or tort, depends upon their conclusion.

SAME. *Counts in tort.*—A count ascribing to the defendant's mere negligence and carelessness, the loss of a negro, whom he, as hirer, was bound to re-deliver, is a count in tort, because the loss is laid to the want of care, not to the failure to re-deliver.

PRACTICE. *New Trial.*—The court of Errors will not set aside a verdict upon the ground merely of insufficiency of proof.

BAILMENT. *Hirer's responsibility—changing service.* A hirer of a slave for a specific service is responsible for all *damages* arising from employing the slave in a different service: as he is also, for a *loss* occurring while the slave is so employed, though the proximate cause of such loss was inevitable casualty.

SAME. *Changing service—conversion.*—It is a fraud upon the rights of the general owner, and a conversion, to put a slave to a service entirely different from that for which he was hired. Story Bail. §413.

SAME. Where there is a general hiring, the hirer is responsible only for ordinary neglect.

On the 21st of August, 1833, Joel Lane made a bill of sale of a slave named Ned to Achilles A. Dickerson, the execution of which having been duly acknowledged, it was registered. Afterwards Lane filed a bill in the chancery court against Dickerson, charging that this sale, though evidenced by an absolute bill of sale, was in fact conditional, and that the negro had been delivered to Dickerson as a security, for a sum of money loaned him by Dickerson. This suit was decided both in the chancery and supreme court against Lane. On the 16th of March, 1835, while this bill was still pending, Dickerson hired the negro to James Angus *to drive his wagon and team*, for nine months; and for the hire Angus gave his note of that date payable on the 25th of December. The negro, it seems, desiring to live with Lane, put himself into his possession on the morning of the day on which he was to go, and while on his way, to Angus. When they came to the house of the latter, Lane told him that he had taken possession of the negro as his own property; but that, as Angus was responsible to Dickerson for his hire, he, Lane, would secure the payment of it in one month, and in the mean time, would keep the negro, paying hire for that time, and surren-

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der the negro to Angus at the end of it, if he failed to give the security. To this Angus assented, but Lane failed to give the security or to surrender the negro, but kept him and refused to deliver him to Angus, who made several unsuccessful attempts to obtain the possession of him. While thus in Lane's possession, and after the expiration of the period of the hiring to Angus, namely, about March, 1836, the negro sickened and died. The note for the hire was assigned by Dickerson, and paid to the assignee by Angus at maturity.

On the 9th of January, 1836, Dickerson sued Angus in Giles circuit court in *case*. His declaration contained seven counts, three of them in *trover*, and the rest special counts in *case*, in which the contract of hiring and the breach of it by failing to re-deliver the negro to the plaintiff was stated; each of them concluding with the averment, that *by and through the mere negligence and carelessness of the defendant, the negro was totally lost to the plaintiff, and never came again to his possession, &c.*

The defendant pleaded not guilty, and issue was thereupon joined.

On the trial at February term, 1838, before Judge DILLAHUNTY, and a jury of Giles, the evidence submitted to the jury presented the case substantially as it is above stated.

His Honor summed up his charge to the jury in the following words—"If Angus hired the negro for a special purpose, and put him to a purpose totally different from that authorised by the contract, this would be a fraud on the rights of the general owner, and would be a conversion. If there was no special contract, but a common or general hiring, then the defendant would be bound to take ordinary care of the negro. And if they believed that Angus hired the negro to Lane, and that this hiring was such an act as a man of ordinary prudence, under the same circumstances, would have done with his own negro, then it would not be a conversion. But if under the circumstances of the case, they believed that it was such an act as a man of common sense and common prudence would not have done, then such act would be a conversion itself."

The jury found the defendant guilty; and his motions for

arrest of judgment and for a new trial having been successively made and overruled, he appealed in error.

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N. S. BROWN for plaintiff in error, said, it was a part of the contract of the hiring that Dickerson was to deliver the negro to Angus. This he failed to do; therefore he is the first wrong-doer himself. He cannot come in now and enforce a contract, when by his own showing there are on his part unperformed conditions, precedent to performance on part of defendant. The defendant was not bound to use any means whatever to recover the possession of the negro in the first instance. For the construction of such contracts, and obligations arising under them, see Chitty on Con. 273-74; see also 1 Saund. 320; 1 Chitty on Pl. 230, 277; Tidd's Practice, 440, 445; Selw. N. P. 5 ed. 107, 108; Lawes on Pl. c 5 and 6; see also 2 Taunt. 325, n.

January 21, 22.

The same rule holds in the case of a concurrent consideration or mutual contract to be performed at the same time.

The contract of Angus with Lane, that he might hire the negro for one month, cannot be construed into an ownership over the negro. The contrary appears by the facts. Angus had repeatedly endeavored to obtain possession of the negro from Lane, under an apprehension that he would be liable to Dickerson for him; and he surely had a right to secure such indemnity as lay in his power. This contract was not by his own free volition. It was a choice of evils forced upon him by Lane.

But the period of Angus' liability to Dickerson being fixed to the delivery of the negro into his possession by Dickerson, according to the contract of hire, no act of Angus' before the negro came to his possession could be equivalent to it. His right to the negro was an inceptive one, which he could have enforced by law against Dickerson, but which could not be rendered equal to possession, by his assuming to dispose of him to a third person. In yielding this temporary use of the negro to Lane, (if yielding it may be called) Angus surrendered nothing that would not have been exacted from him by Lane without any contract. He acted under duress, and a mistaken notion of his obligations to Dickerson; and it would be as well to frame a law out of his legal appre-

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hensions, and make it operate against his rights. As well might A, who had by accident taken the life of B, be convicted of murder merely because he believed it was murder. This would be at once adopting the fears and apprehensions of men as the measure of legal rights on the one hand, and legal liabilities on the other. It would be levelling down the grave administration of the law to the touchstone of ignorance and caprice, and making the vague notions of right and wrong among men the law of the land. So much for constructive possession of the negro by Angus.

2. Assuming in the second place, that Angus had possession of the negro, it remains to be inquired what was the extent of his liability according to the facts. It is a well settled principle, that the hirer of property is only bound for ordinary diligence, and of course is responsible only for ordinary negligence. See Jones on Bail. 86, 87, 120, and Story on Bail. 264, 265, 266.

“Also, if the thing hired is lost by inevitable casualty, or by superior force, and without any fault of the hirer, he is exonerated from all risk.” See Story on Bail. 269, and 3 Burr. 1592. “So, if the loss be not strictly inevitable, but there has been no omission of reasonable diligence on the part of the hirer.” *Id.*

Under a contract of hiring, the hirer acquires a special property in the thing hired, during the continuance of the contract. He can maintain an action for any tortious dispossession of it, even against the owner himself. The owner parts with his whole property in it for the time being. Cannot the hirer appropriate the thing hired as he pleases, so he uses ordinary diligence in preserving it, and no injury happens to it by his neglect? Cannot he, therefore, being the sole proprietor for the time being, hire it to a third person, being responsible for neglect in that third person? And if, as in this case, the property perishes in the hands of the second hirer, and never returns to the owner, and ordinary diligence was used to preserve it, how can the first hirer be responsible? In this case the negro died. This is an inevitable casualty: all due means were employed to preserve him. There was no neglect either on the part of Angus or Lane. His death was not

*That is what
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The hirer is
acting within
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his contract
that when he
disposes of it
he is responsible
for its preservation
by accident*

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caused by any want of diligence. The diligence or neglect of Lane is the diligence or neglect of Angus; for he stands in the relation of agent to Angus for those purposes. Where then is the fault of Angus? Surely not in his neglect of the negro; he is not responsible for his death. His fault, if any, consists in the detention of the negro beyond the expiration of the term of hire; but he is not to be answerable on this account for the value of the negro. The value of his time during that detention, would be the only proper measure of damages. See *M'Neill vs. Brooks*, 1 Yerg. 73.

COMBS on the same side, insisted, 1, that the court erred in refusing to arrest the judgment on account of a misjoinder of causes of action. 1 Chitt. Rep. 619, *Thomas vs. Pearce*; 1 Chitty's Pleadings, 180, 182; 1 Salkeld, 10; 1 L. Raymond, 272-3; 2 Saunders, 117.

If a count be for nonfeasance and breach of contract, it will be taken to be in assumpsit and cannot be joined with a count in trover. 1 Chitty's Pleadings, 180; and for the consequence of a misjoinder, see 1 Chitty's Pleadings, 188.

2. The jury were misdirected by the court in this, that they were charged, that if Angus hired the negro for a particular purpose or use, and during the time of the bailment, put the negro to any other purpose or use, this would be a conversion, and Dickerson would have a right to recover in trover without any demand of the negro. To show that this was a mistaken direction of the law, see *Gordon vs. Harper*, 7 Term Rep. 9; *M'Neill vs. Brooks*, 1 Yerger, 73; *Caldwell vs. Cowen*, 9 Yerger, 262.

WRIGHT for the defendant in error. 1. Case and trover may be joined in the same action. The form of the action is the same, the same plea may be pleaded, and the same judgment given on all the counts in the declaration. 1 Chitty's Pl. 179, 124; *Govett vs. Radnidge*, 3 East, 70; *Brown vs. Dixon*, 1 T. Rep. 173.

The other counts in this declaration joined with the counts in trover are well framed, and are properly special counts in case, founded upon a tortious negligence or breach of duty in the defendant. In all actions upon a simple contract, whether express or implied, it is at the election of the plaintiff to

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frame his declaration in case or assumpsit. The *gravamen* of the action in the one case consists of a breach of duty; in the other, in a breach of promise. *Brown vs. Dixon*, 1 T. Rep. 273; Comyn on Contracts, 21; *Dickson vs. Clifton*, 2 Wils. 319; *Coggs vs. Bernard*, 2 L. Raym. 909. See precedents in 1 T. Rep. 273; 2 Lord Raymond, 909; 1 Ch. Pl. 122, 3; *Govett vs. Radnidge*, 2 East, 70; 1 Ch. P. 129, 5th American from 4th London edition; *Dearborn vs. Dearborn*, 15 Mass. Rep. 316; *Gilbert vs. Williams*, 8 Mass. 51; *Church and Demitt vs. Munford*, 11 Johns. Rep. 479. The nature of the defendant's undertaking and duty should be distinctly averred; at all events the averment will not vitiate the counts. 1 Ch. P. 331; *Elsee vs. Gatward*, 5 T. Rep. 144; *Stoyell vs. Westcott*, 2 Day's Rep. 418; *Bulkeley vs. Storer*, 2 Day, 531; *Samuel vs. Judin*, 6 East, 333, in point; 2 Chitty's Pl. 651; precedents 651, 652, 653, notes *c. p.*; 2 Ch. Pl. 654, 663, 664, 669, 670. The declaration in 12 East, 452, was admitted to be in tort; *Hallack Powell*, 2 Cain's Rep. 216; *Mast vs. Goodson*, Black. 848.

The court will sustain the verdict if possible. 2 Cain's Rep. 217, 218.

If all the counts are in tort and some only are defective, the verdict will be sustained. 1 Ch. Pl. 179; 6 East, 331, 335; 2 Term Rep. 205; Peck's Rep. 318; Act 1801, c. 6, § 63.

2. It is very clear from the proof that Dickerson hired and delivered this negro to Angus, and that Angus in point of fact and law, received him and took upon himself the duties and obligations of a hirer. In order to constitute a good delivery, it is not necessary that there should be an actual manual reception of the chattel by the vender. Undertaking to deal with the property as his own, either wholly or for a time, will have the effect. *Chaplin vs. Rogers*, 1 East, 192; *Rice vs. Austin*, 17 Mass. Rep. 197. This being the case, I contend,

3. That the hirer of a slave takes upon himself a personal trust, and in the absence of any express authority from the owner, has no power to hire out such slave again. Slaves are a peculiar species of property; in the language of this court "a property in intellectual and moral and social qualities, —in skill, in fidelity and in gratitude, as well as in their capaci-

ty for labor." *Henderson vs. Vaulx and wife*, 10 Yer. Rep. 37, 38, 39; *State vs. Thompson*, 2 Tenn. Rep. 96; principles applicable to this peculiar property must be adopted and enforced. Story's Com. on Bailments, 368; *Boyce vs. Anderson*, 2 Pet. Rep. 150. It is against every principle of humanity and sound policy, to permit a person who hires a slave to dispose of him at his own will and pleasure to any and all persons whatsoever. If in the absence of any express limitation, the hirer can dispose of the slave to one person and for one purpose, he may to any and for all purposes whatsoever. Hence, in the absence of any express stipulation, the law comes in and makes it a personal trust.

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4. But the testimony was sufficient to warrant the jury in coming to the conclusion that Angus was restricted from parting with the possession of the negro. "He hired him to drive his own wagon and team and for his own use."

5. It was a want of that "ordinary care" and prudence in Angus, which the law required he should maintain, to hire the negro to Lane. Angus was therefore guilty of a conversion the moment he hired Ned to Lane, which determined the bailment, destroyed his special property in him, and made him liable thereafter for inevitable accidents. The law is well settled, if the bailee use the thing for a different purpose, or *dehors* the contract of bailment, he is liable at all events. *McNeill vs. Brooks*, 1 Yer. Rep. 73, 74; Story on Bailments, 261, 262, 263, 272, 273. Hence he was liable in case of negligence. 1 Yerger, 73, 74.

But suppose there was no conversion during the time for which the negro was hired to Angus, and that he was not wanting in care and prudence, in the act of hiring him to Lane, still the case is with me; for

6. Angus was bound to restore the negro to Dickerson whenever the time for which he was hired expired. If he did not, and he died or was lost by inevitable accident, he is liable. Story 272, 273; 2 Lord Raym. 915; *Wheelock vs. Wheelwright*, 5 Mass. 104; *Isaacs vs. Clarke*, 2 Bulst. Rep. 306, 309; Story, 93; Jones on Bailments, 22; note Code Napoleon, Jones, 68; see also note L, 68-70; Jones, 121; see 3d and 4th rules, 121. He is liable on all the counts, ei-

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ther in trover or for a breach of duty. Jones, 49, 51, also note F; Story, 93, 272, 273; 16 Johns. Rep. 74, 75; 1 Comyn's Digest, 639. In this case there was an express contract to restore the negro on the 25th of December, 1835; independently of this, the law implies a contract to restore at the expiration of the time. Story, 273.

No demand was necessary in this case. 9 Johns. Rep. 360, 361; Story, 273. There was a precedent duty. 9 Johns. 361. But suppose there was no bailment of this negro by Dickerson to Angus, suppose the delivery never to have been perfected, and that no special property was created in Angus, still the case is with me; for

7. Angus was still guilty of a conversion of this negro. He either had a special property or he had not. If he had, the propositions before taken are sustained; if he had not, he had no right to intermeddle with the negro. Any intermeddling with property, or the exercise of any dominion over it, subversive of the dominion of the owner, is evidence of a conversion. 1 Comyn's Digest, 439; *Reid vs. Colcock*, 1 Nott and M'Cord; *Kinder vs. Shaw*, 2 Mass. 398; *Barton vs. White*, 1 Har. and Johns. 519; *Bristol vs. Hurt*, 7 Johns. Rep. 254; 10 Johns. 172; 14 Johns. 128. To constitute a conversion, it is not necessary to show a manual taking of the thing in question; nor that the defendant has applied it to his own use; but any unauthorised disposition or dominion over it will be a conversion. *Bristol vs. Hurt*, 7 Johns. Rep. 254; 7 Johns. 304; *Bisset vs. Drake*, 19 Johns. Rep. 66; 4 Taunton, 24.

GREEN, J., delivered the opinion of the court.

1. The first question is, whether there is a misjoinder of counts in this declaration.

The first three counts are in *trover*, and it is contended in behalf of the plaintiff in error, that the other four counts are in *assumpsit*, and are improperly joined with the counts in *trover*. It is clear that counts requiring different pleas and different judgments, cannot be joined in the same action, and such are *trover* and *assumpsit*. 1 Chitty Pl. 208; 16 John. R. 146; 2 Saund. R. 117.

Whether the four last counts in the declaration are *assumpsit*, or *case*, depends upon a distinction not very obvious. In either case, the contract must be set out correctly as it existed, by which the negro came into possession of the party, and by which his duties and obligations were created, and the difference exists in the conclusion, or assignment of the breach.

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"In an action on the case, *ex contractu*, the contract and its violation is the gist of the suit, and the injury sustained thereby, is collateral thereto; and in an action on the case, *ex delicto*, the wrong done, either by misfeasance, malfeasance, or nonfeasance, is the gist of the proceedings, and the contract collateral thereto." *Baxter & Hicks vs. Pope MS.**

*BAXTER & HICKS vs. POPE.—PLEADING. *Rule to distinguish between counts in case ex contractu and ex delicto.* In the former, the contract and its violation are the gist of the suit,—the injury sustained thereby is collateral thereto. In the latter the wrong done, whether by misfeasance, malfeasance or nonfeasance, is the gist of the action, the contract collateral thereto.—PRACTICE. *Witness, by whom credit of cannot be impeached.* The party who introduces a witness cannot ask him a question tending to impeach his credit. But if the defendant use a witness of the plaintiff to prove a substantive matter of defence, may not the plaintiff impeach his credit?

TURLEY J. delivered the opinion of the court.

This is an action on the case in form *ex delicto*, against the hirer of a negro man for not returning him at the expiration of the term for which he was hired.

It is objected, that there is a misjoinder of actions in the declaration. It is a principle too well settled to admit of dispute that actions which require different pleas and different judgments, cannot be joined,—such as those in which the pleas are *not guilty* and *non assumpsit*, and the judgments are *quod capiatur* and *in misericordia*; and that this objection is good in arrest of judgment and on writ of error. 1 Chitty Plead. 208; 16 Johnson 146; 2 Saund. 117. Whether there is in this case, such a misjoinder, depends entirely on the construction to be given to the second count in the declaration. All the rest are in form, case *ex delicto*; but this, it is contended, and we think successfully, is in *assumpsit*.

It is sometimes difficult to distinguish with certainty between a declaration in an action on the case in form *ex contractu*, and in form *ex delicto*. A good rule to solve the uncertainty is this, that in an action on the case *ex contractu*, the contract and its violation are the gist of the suit, and the injury sustained thereby is collateral thereto; and in action on the case *ex delicto*, the wrong done, whether by misfeasance, malfeasance or nonfeasance, is the gist of the proceedings, and the contract collateral thereto. And the question is—whether this count is framed on the contract to hire and return, or on the negligent conduct of the plaintiff in error, by which a loss has been sustained by the defendant in error?

This count is in substance—"That the plaintiff below, at the special instance and request of the defendants, let and delivered to them a male servant of the value of one thousand dollars, to be had and used by them for a certain price, then and there agreed upon; and in consideration of said agreement and said price, the plaintiff then and there delivered said servant to said defendants to hire for

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Judging these counts, (for they are all substantially alike,) by these rules, we think they are in form *ex delicto*, and are well joined with the counts in trover. The conclusion of the last count is, "that the defendant did not, nor would, re-deliver the said last mentioned negro man Ned to the said Achilles A., on the said 25th of December, in the year 1835, or at any time hitherto; but on the contrary thereof, has hitherto wholly neglected so to do; and took such little and such bad care of the said last mentioned negro Ned, that he, the said negro Ned, by and through the mere negligence and carelessness of said James in this behalf, is totally lost to the said Achilles A.'" Here the loss is charged as having been produced by the want of care, the negligence and carelessness of the defendant, and not as the consequence of his failure to deliver the negro. Hence the gist of the charge is the wrong

one year, and then and there agreed with said defendants, that at the expiration of said term, said servant was to be re-delivered by the defendants to the plaintiff." And the breach assigned is on the promise, viz. "That although the time for the hire of said servant had expired, and although the defendants had been often requested to deliver him, yet, they, not regarding their duty and promise so made in this behalf, but contriving to deceive, injure and defraud, had not delivered said servant to said plaintiff; by means of which he has wholly lost the use of said servant, and sustained damages to the amount of \$1000."

It is hard to conceive that this is not an action brought for a breach of the contract to re-deliver; and the declaration appears to us to be, in substance, a copy of the forms in an action of *assumpsit* against a bailee, given in 2 Chitty's Pl. from page 139 to 156.

The precedents in an action on the case in form *ex delicto* against a bailee, may be seen in 2 Chitty's Pl. 311 et seq., in which it will be seen that the breach assigned is not of a contract, but of the performance of a duty, of the defendant, which consists always either in a nonfeasance, misfeasance or malfeasance. We therefore think that there is a misjoinder of actions in this case, and that the judgment must be reversed and arrested.

NOTE. There was another point determined in this cause, which, however, is beside the purpose for which it is now reported. The plaintiff had examined a witness, and he had been allowed to retire. He was afterwards recalled by the defendant, and asked a question, on answering which, the plaintiff propounded a question to him, the answer to which was designed to impeach his credit. This was objected to by the defendant, but his Honor, the circuit judge, allowed the question to be put; and then allowed the plaintiff to introduce other witnesses to prove that the witness in question had made to them statements different from his present testimony. This court decided that this was erroneous, upon the well settled principle, that a party who introduces a witness cannot impeach his credit. But they expressly left undecided the question—Whether when the defendant recalls the plaintiff's witness, and proves by him a substantive matter of defence, the plaintiff may not assail his credit?

done by the malfeasance of the defendant, and the contract, as stated, is merely collateral. The action, therefore, is in form *ex delicto*, in all the counts. Angus
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2. It is insisted that Angus never had possession of the and therefore is not liable.

Upon this point the charge of the court is not complained of; but it is said there was not sufficient evidence to have authorised the jury to arrive at the conclusion, that possession had been acquired by the defendant. We do not feel called upon to criticise the testimony, inasmuch as there was proof conducing to show that the possession had been taken by the defendant. This court will not set aside verdicts upon the ground merely of the insufficiency of the proof.

3. It is next insisted that there was no act of Angus that ought to be regarded as a conversion of the negro.

Upon this point the court charged the law correctly, that "if Angus hired the negro for a special purpose, and he put him to a purpose totally different from that authorised in the contract, this would be a fraud on the right of the general owner, and would be a conversion." See Story on Bailments, § 423, p. 272-3.

It was left to the Jury to say from the evidence, whether it was a special hiring; and whether the property was employed in a manner different from the purpose for which it was hired. There was evidence conducing to prove that Angus had hired the negro specially to drive his wagon.

If that were so, and he afterwards hired him to Lane, it would be a violation of his contract, and a conversion of the property. An owner of a slave might be very willing to hire his servant to A. to drive his wagon, and at the same time would by no means agree, that he should be employed under B. to drive his wagon. Hence, if there be a special stipulation in the contract of hiring as to the description of labor the servant is to perform, and the hirer employ him in an entirely different kind of service, he is responsible for all damages, and if a loss occurs, although by inevitable casualty, he is responsible therefor. Story on Bailments. § 413.

The court also told the Jury in substance, that where there is a general hiring, the hirer was only liable for ordinary ne-

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glect; and that if the facts of this case showed such general hiring, and the defendant had acted as a man of ordinary sense and prudence would act with his own property, he was not liable.

The whole case was thus fairly before the Jury, and had the verdict been either way, we should not have felt authorised to disturb it.

Let the judgment be affirmed.

COWAN vs. DUNCAN.

PRINCIPAL AND SURETY. *Contribution—sureties for successive appeals are not co-sureties.* If a judgment, rendered by the county court against two, is affirmed in the circuit court against them and their surety for the appeal, and again affirmed in the supreme court against the three and their surety for the second appeal, the first and last sureties are related as principal and surety, not as co sureties; and if the first pay the judgment, he is not entitled to contribution from the second.

On the 30th of March, 1833, William P. Campbell and George W. Richardson, of Franklin county, executed their note to Johnson and Rayburn, Merchants of Nashville, for five hundred and ninety-seven dollars, seven cents, payable one day after date. On the 19th of July afterwards, Johnson and Rayburn sued them on this note in the county court of Franklin, and at November session, 1833, recovered judgment. The defendants appealed to the circuit court, and gave Stewart Cowan as surety for the appeal. At January Term, 1834, of the circuit court, the judgment of the county court was affirmed, and judgment rendered against Campbell, Richardson and Cowan for the amount of the judgment of the county court, and twelve and a half *per cent. per annum* damages. From this judgment Campbell, Richardson and Cowan appealed in error to the supreme court at Sparta, and they all joined as principals in an appeal bond with Joseph Duncan as their surety. At August Term, 1835, of the supreme court, the judgment of the circuit court was affirmed, and judgment was pronounced that the plaintiffs "recover against the said William P. Campbell, George W. Richard-

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son and Stewart Cowan, the surety for the prosecution of the appeal from Franklin county court to Franklin circuit court, and who joined in the writ of error to this court, the plaintiffs in error, and Joseph Duncan, their surety for the prosecution of the writ of error to this court, the sum of," &c.

A *fi. fa.* to have execution of this judgment was issued to the sheriff of Franklin, who, on the 23d of February, 1836, thereupon sold 250 acres of land, as the property of Cowan, for 750 dollars, and returned the execution to the clerk's office of the supreme court.

On the 30th of May, 1838, Cowan, upon a copy of the foregoing proceedings, moved in the circuit court of Coffee, before Judge MARCHBANKS, for judgment against Duncan for his ratable proportion of the above recited judgment of the supreme court, "in favor of Johnson & Rayburn against Richardson and Campbell, and the said Cowan and Duncan as their sureties."

His Honor refused the motion, and Cowan appealed in error to this court.

TAUL, in support of the motion, said, the ground upon which it was overruled was, that Cowan had joined Campbell and Richardson in their appeal to the supreme court, and that consequently Duncan was surety for him, as well as for Richardson and Campbell.

The record of the entry praying the appeal, from the circuit to the supreme court, states, that the appeal was prayed by the defendants." The appeal bond recites that R. & C. and Cowan, prayed for and obtained the appeal.

The plaintiff contends that he and the defendant were co-sureties for R. & C., and as he paid the whole amount of the judgment, that he ought to have a judgment over against Duncan for a moiety thereof.

LAUGHLIN, for the defendant, said, the motion must be founded upon the acts of 1801, c 15, § 1 and 2, and 1809, c 69, § 2 and 3; and the demand of the plaintiff to a recovery on motion, or in any other way, does not come within the provisions of these acts. Duncan was not the co-surety of Cowan for Campbell and Richardson, but he was the

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surety for Cowan, and Campbell and Richardson, who all jointly appealed from the judgment of Franklin circuit court, when Duncan became their surety. There is no law by which he can be bound to contribute a rateable part of what Cowan has paid. To give Cowan recourse over upon Duncan in this motion, or in any other way, would be allowing a principal to call upon his own surety to contribute to the payment of the principal's liability. In the appeal bond to the supreme court, the first and only obligation Duncan entered into, Cowan, as well as Campbell and Richardson, was a principal; and if he, after paying the debt or judgment, can go back upon Duncan, under the acts of Assembly, for any part of the money, so can Richardson or Campbell, if they have paid it. Duncan is as much the surety of Cowan as he is of Campbell and Richardson. If this is true, the judgment of the circuit court, refusing the motion of Cowan must be affirmed.

January 23.

TURLEY J. delivered the opinion of the court.

The plaintiff became surety for an appeal from the county court of Franklin to the circuit court, on a judgment in favor of Johnson & Rayburn, against George W. Richardson and Wm. Campbell.

The judgment of the county court was affirmed against Richardson and Campbell, and the plaintiff as their surety. They prosecuted an appeal in the nature of a writ of error to the supreme court, and the defendant, Joseph Duncan, became their surety therefor. Judgment was rendered in the supreme court against them, and the plaintiff has paid the whole debt, and now asks a contribution of one-half from the defendant, as his co-surety. He is, upon no principle, entitled to it; they never were co-sureties. When the defendant became surety, Judgment had been rendered against the plaintiff, and he was as much the surety of the plaintiff for the appeal, as of Richardson and Campbell; and if he had paid the money, would have been entitled to a judgment against him for the whole amount.

The judgment of the circuit court will therefore be affirmed.

THE STATE vs. HORN.

CRIMINAL LAW. *Who may let to bail—Sheriff when and when not—Recognizance when void.* Except in the special cases pointed out by law, the sheriff has no power to let to bail persons committed for criminal offences. By the act of 1831, c 4, he may not let to bail one who has been committed because the examining magistrate did not know whether the offence was bailable or not; and a recognizance reciting that cause of its being taken by the sheriff is void.

On the 26th of December, 1836, William P. Horn was arrested on a charge of unlawful and malicious stabbing, and brought before Mr. Justice Samuel Farris, of Giles, for examination. The justice being of opinion that Horn was guilty of the charge, and not knowing whether the offence was bailable or not, therefore, committed him to the jail of the county to await his trial. Application was made to the sheriff to take bail, and he, believing it to be his duty, took from the prisoner, with James Horn as surety, a joint and several bond or recognizance, in the penalty of one thousand dollars, conditioned—"that whereas the said William R. Horn, on the 26th day of December, 1836, was arrested on a charge of unlawful and malicious stabbing, at the instance of one Campbell Graves, the prosecutor, and brought before one Samuel Farris, a justice of the peace for said county, for an examination: and whereas, the said Samuel Farris, justice as aforesaid, did proceed to examine said William R. Horn on said charge, and being of opinion that he was guilty of the same, *and not knowing whether the said offence was bailable or not*, did commit the said William R. Horn to the jail of the aforesaid county, to await his trial for said offence, and application having been made to James S. Webb, the sheriff of said county, to receive bail for the appearance of the said William R. Horn, to answer for said offence, and he believing it to be his duty to receive said bail. Now, therefore, if the said William R. Horn, make his personal appearance, at the next term of the circuit court for the aforesaid county of Giles, to be held at the court house, in the town of Pulaski, on the third Monday of February next, on the first Thursday thereof, then and there to answer the State of Tennessee,

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upon said charge of unlawful and malicious stabbing, and not depart from said court without leave of the same, then the above obligation shall be void, otherwise to remain in full force." This recognizance was signed and sealed by William R. Horn and James Horn, and acknowledged before Thomas C. Webb, sheriff, on the 30th of December, 1836.

William R. Horn made default, and on the 2d of March, 1837, a forfeiture was taken and entered of record, and a *scire facias* awarded. This was returned as to James Horn, "not to be found" on the 24th of June. An *alias* was issued which was returned on the 21st of October, that James Horn was not to be found, and had removed to Missouri.

At October Term, 1837, James Horn's appearance was entered by A. Wright, his attorney, and he filed a demurrer to the *scire facias*. Among the reasons assigned for the demurrer was the following—"It appears from the face of said *scire facias*, that the sheriff had no power to take said recognizance. The defendant was not committed to jail for want of security by the magistrate, but because he did not know whether said supposed offence was bailable, or not. Now by the common law the sheriff had no power to take a recognizance, and by statute he only has such power, where the accused is committed to jail for want of bail."

On argument of the demurrer, at February Term, 1838, before his Honor Judge DILLAHUNTY, he sustained it; and the Solicitor General appealed in error.

January 18.

The ATTORNEY GENERAL contended, that the recognizance in this case was well justified by the act of 1831, c 4. For though the enacting clause confined the sheriff's power of bailing to the case when the defendant is committed for the *want of security*, yet as the *proviso* is, that bail is not to be taken when the examining magistrate *has determined the offence not bailable*, it followed, that when the defendant is committed for any other reason than the unbailability of the offence, the sheriff may take the security. Otherwise the party may lie in jail indefinitely, since the magistrate might never resolve his doubts, or remove his ignorance whether the offence was bailable or not. The justice had not, he said, reserved the question for consideration, and committed

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the accused till he could be satisfied of his power, but had committed him to await his trial in the circuit court. He had not determined that the offence was not bailable, which was the only case in which the act of 1831 seemed to contemplate that the sheriff should not take bail. Dealing with this statute as with others, and interpreting its ambiguities by the context, it could scarcely be doubted that the case, though not expressly provided for, might without violence be brought within its purview.

WRIGHT, for the defendant in error, insisted, that at common law the sheriff had no power to take bail in a criminal case. 1 Ch. Cr. Law, 96, 97. This power is given in a few specified cases by statute; the jurisdiction is a special and limited one, and his authority to act must be tested by all the rules applicable to such proceedings. Now the *scire facias* should show before whom it was taken, and that he had power to take it. *Bridge vs. Ford*, 4 Mass. 641, 642; *The People vs. Powers*, 4 Johns. Rep. 292; *Jones vs. Reed*, 1 Johns. Ca. 20; *Wells vs. Newkirk*, *Id.* 228; *Shivers vs. Wilson*, 5 H. & J. 130; *Commonwealth vs. Downey*, 9 Mass. 520; *The State vs. Smith*, 2 Greenl. 62. The recognizance must stand or fall by itself; it should be a complete record, embodying every fact necessary for a recovery. 9 Mass. 520.

But here it shows upon its face the want of authority in the sheriff to take it. The defendant was not committed to jail for want of security by the magistrate, but because he did not know whether the offence was bailable or not. Now by the act of 1831, he only had such power where the accused is committed to jail for want of bail. *Rose vs. Dean*, 7 Mass. 280. This is a case omitted. It is not provided for, though it is of the same nature as the case which is embraced by the act.

TURLEY, J. delivered the opinion of the court.

A sheriff, in this state, has no power to take bail for the appearance of prisoners committed for offences, except such as is given by statute.

The act of 1831 makes provision, that the sheriff of the

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county may receive bail, where the accused has been committed for want of security; but it does not authorise him to do so in any other case; and out of abundant caution, prohibits bail, being taken where the examining magistrate shall have determined the offence not bailable.

In the present case the bond of recognizance taken by the sheriff, makes a different case from that, which is provided for by the statute. It recites, that the offender had been committed, because the justice did not know whether the offence was bailable or not. Now the statute gives no power to the sheriff to adjudge the question, he is a mere ministerial officer, and can only act where the committing magistrate has held the offence to be bailable, and committed for want of bail.

The sheriff then had no power to take the bond of recognizance in this case,—it is void, and the court below therefore committed no error in refusing to pronounce a judgment thereon.

Let the judgment be affirmed.

THE STATE vs. MOORE.

PENALTY — to State alone, limitation of actions for—31 Eliz. c. 5, § 5—1829. c. 62, § 2.—Actions for penalties where the recovery is for the government alone must be prosecuted within two years after they shall have accrued. The statute of Elizabeth, so limiting those actions, is in force here.

The defendant was sued before a justice of Giles upon the following warrant:

“STATE OF TENNESSEE: Giles county. To any lawful officer of said county to execute and return. You are hereby commanded to summon Osborne R. Moore, if to be found in your county, personally to appear before me, or some other justice of the peace for said county, to answer the State of Tennessee in a plea of debt for one hundred dollars, for peddling in, and selling clocks in the said county of Giles, for the year one thousand eight hundred and thirty-four, without having obtained a license therefor, as by law he was bound to do:

the said one hundred dollars being the penalty claimed from said Moore, in consequence of his neglect and refusal to obtain license as aforesaid. Herein fail not. Witness my hand, seal—a justice of the peace for said county. January 4, 1838. B. N. Sessum, justice of the peace. (Seal.)”

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The warraht had on it the following endorsement. “On the information of Thomas J. Kennedy, that the offence mentioned in the within warrant has been committed, I, E. D. Jones, clerk of the county court of Giles, have consented that this case may be proceeded in by any justice of the peace having cognizance of the case. Jan. 4, 1838. E. D. Jones clerk.

The defendant was tried on the 19th of January before Mr. Justice John Young of Giles, who discharged him. The clerk appealed to the circuit court. There it was tried at February Term, 1838, before his Honor Judge DILLAHUNTY, and a jury. The jury found a verdict for the State. The defendant moved in arrest of judgment; and on argument of the rule, it was made absolute. The Solicitor-General appealed in error.

The ATTORNEY GENERAL, for the State, submitted the cause to the court. January 18.

N. S. BROWN and COMBS, for the defendant, insisted that the judgment was properly arrested.

Because the warrant shows the whole case, and in doing so, shows that the action was barred by the statute of limitations, and that, therefore, there was no cause of action when this suit was commenced. The act of 1715, c. 21, § 7, adopts all the statute laws made for the limitation of actions in England.

The statute 31 Elizabeth, c. 5, § 5, limits all actions upon penal statutes, made, or to be made, if the recovery is to be made for the government alone, to two years; and if the penalty be given to the government and to any one who will sue, to one year. 4 Bacon's Abridgment, Gwillim's Ed. 466.

TURLEY, J. delivered the opinion of the court.

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This is a suit brought by the clerk of the county court of Giles, against the defendant, to recover a penalty of one hun-

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dred dollars, for having peddled clocks in said county, without having first procured a license therefor, under the provisions of the act of 1829, c. 62.

The warrant was issued on the 4th of January, 1838, and charges the offence to have been committed in the year 1834. This suit is prosecuted by the clerk for the benefit of the State.

By the words of the warrant, it is manifest that more than two years had elapsed after the commission of the offence, before the suit was instituted. The statute of the 31st Eliz. c. 5, § 5, enacts "that all actions upon penal statutes, made, or to be made, if the recovery is to be for the King alone, shall be prosecuted within two years after they shall have accrued."

The question is, whether this statute is in force here? We think it is. The act of 1715, c. 31, § 7, passed in North Carolina, and in force in this State, provides that "all the laws of England made for the limitation of actions, and preventing vexatious law suits, shall be in force," &c. This is conclusive on the question. The statute has the same validity here, as if it had been enacted here.

The judgment of the circuit court in arresting the judgment, was therefore correct, and will be affirmed.

NOTE. The statute of Elizabeth, in question, is entitled "An act concerning informers." It is preceded by the following preamble. "For that divers of the Queen's Majesty's subjects be daily unjustly vexed and disquieted by divers common informers upon penal statutes, notwithstanding any former statute that hath been made against their disorders, for remedy whereof" divers provisions are made, and the fifth section provides—

"And be it further enacted by the authority aforesaid, that all actions, suits, bills, indictments or informations, which after twenty days next after the end of this session of Parliament, shall be had, brought, sued or exhibited, for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture shall be limited to the queen, her heirs or successors only, shall be had, brought, sued or exhibited within two years next after the offence committed, or to be committed, against such act penal, and not after two years. And that all actions, suits, bills or informations, which, after the said twenty days, shall be had, brought, sued or commenced, for any forfeiture upon any penal statute, made or to be made, except the statute of tillage, the benefit and suit whereof is, or shall be, by the said statute, limited to the queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued or commenced, by any person that may lawfully pursue for the same as aforesaid, within one year next after the offence committed, or to be committed, against the said statute; and in default of such pursuit, that the same shall be had, sued, exhibited or brought for the

Queen's majesty, her heirs or successors, at any time within two years after that year ended. And if any action, suit, bill, indictment or information for any offence against any penal statute, made or to be made, except the statute of tillage, shall be brought after the time in that behalf before limited, that then the suit shall be void and of non effect, any act or statute made to the contrary notwithstanding."

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MILLER vs. ESTILL.

CONVEYANCE. *Deed—registration, date of if omitted, how supplied.* If it appear from the Registry that a deed and the certificate of probate or acknowledgment endorsed thereon had been registered, but the date of the registration omitted, the Register or Deputy Register may be examined to supply the date.

Ejectment for eight acres of land in the vicinity of Winchester. The action was commenced in Franklin circuit court on the 12th of January, 1832. The demise was in the name of Thomas Miller, and notice of the action was served on Wallace Estill and Thomas Logan, who were admitted at July Term, 1832, to defend instead of the casual ejector, upon the common rule.

On the 4th day of June, 1818, a judgment had been recovered in the county court of Franklin, by William Patterson against John Dougherty, for 1090 dollars debt, and damages, besides costs of suit. To have execution of this judgment a *fi. fa.* had been issued on the 18th of November, 1818, tested as of the preceding August Term, which had been suspended, by an injunction, which was not dissolved till the 14th of December, 1824.

In the mean time, namely, on the 6th of March, 1820, Dougherty mortgaged the premises to Luke Tiernan & Son, to secure the payment of 3000 dollars which he owed them, conditioned to be absolute if he failed to pay the money and interest thereon in two years, from the 8th of January, 1820. The execution of this deed was acknowledged in the county court of Franklin at February Term, 1820; and upon it were endorsed the following certificates of registration:

1. "This mortgage deed is registered in the register's office of Franklin county, in Book F. page 327, 328 & 329." Signed, "*John J. Hayter, D. R.*" March 7, 1820."

"STATE OF TENNESSEE. I, Jesse Wallace, Register of Franklin county, do hereby certify that the foregoing deed of

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mortgage, as well as the certificate of acknowledgment thereon endorsed, are registered in the register's office of said county, in Book F., pages 327, 328 and 329; but there is no date to the registration of said deed and certificate, 26th of July, 1836.

Jesse T. Wallace, Register."

On the 23d of December, 1824, an *alias fieri facias* was issued upon Patterson's judgment against Dougherty, tested as of November Term, 1824, which was levied upon the premises, but owing to a mistake in the advertisement, a sale was not effected. A *pluries fi. fa.* was now issued on the 9th of March, 1825, tested as of February Term, preceding. This was levied upon the premises on the 11th of March, and on the 25th of April, 1825, they were exposed to sale; and Thomas Miller, the lessor of the plaintiff, became the purchaser. On the 8th of June, 1825, the Sheriff made him a deed, the execution of which was proven in Franklin circuit court on the 12th of July 1828, and registered on the 14th of the same month. This deed was the plaintiff's title.

Tiernan and Son filed a bill in the chancery court of McMinnville, against Dougherty, to foreclose the aforesaid mortgage, and on the 16th of June, 1828, a decree of foreclosure was pronounced, under which the premises were sold on the 1st of November, 1828, to Luke Tiernan & Son, to whom the commissioner, who executed the decree, made his deed, dated the said 1st of November, 1828, the execution of which was acknowledged in February 1829, and it was registered on the 17th of March, 1829. The mortgage deed, and the commissioner's deed, were read by the defendants to show an outstanding title.

The case was tried at September Term, 1838, before his Honor Judge MARCHBANKS, and a jury of Franklin. On offering the mortgage deed in evidence, the defendant's counsel examined John J. Hayter, who proved that he had been deputy under John Keeton, formerly register of Franklin county, and that the first certificate of registration endorsed on the mortgage deed was in his hand writing, and was put there by him as deputy register. The defendant then offered to read the certificate as evidence to the jury, but upon the objection of the plaintiff's counsel, it was rejected by the

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court, to which the defendant excepted, and the court signed a bill of exceptions stating the facts. The defendant then read the deed from the commissioner in chancery, to Tiernan & Son, and now introduced Hayter again, to prove the *time* of the registration of the mortgage deed. The plaintiff objected to this, but the court allowed him to state, that judging from the certificate itself, which was in his hand writing, it was made on the 7th of March, 1820, but he had no recollection of the time. He said, however, that it was made before 1825. The plaintiff tendered a bill of exceptions to the decision of the court admitting this testimony of Hayter as to the time of the registration, which was signed by the court.

His Honor charged the jury, that as the law stood at the date of the deed, from the Sheriff to the lessor of the plaintiff, and of the mortgage deed from Dougherty to Tiernan & Son, if a deed were registered within twelve months from its execution, it took effect from its execution, but if not registered within that time, it took effect only from the registration; that the certificate of Wallace, the register, upon the mortgage deed, was evidence that the deed and certificate of probate thereupon were registered; but not as to the *time when* they were registered; that as the time of the registration does not appear from the record of registration, it is competent for the defendant to show by parol evidence, and the jury must determine from that evidence the time of the registration.

The jury found a verdict for the defendants, and the court gave judgment accordingly. The plaintiff appealed in error. January 23.

TAUL, for the plaintiff, said—This is the same case which has been twice before this court, and is reported in 8th and 10th Yerger.

When the case was first before the court, the decision turned upon the priority of the registration of the deeds, under which the parties respectively claimed the land in controversy.

Upon the second trial in the court below, the circuit judge rejected the mortgage deed from Dougherty to Tiernan, (under which defendants claim,) on the ground of the insufficiency of the probate, or clerk's certificate of the acknowledgment of the deed by Dougherty.

When the case came before this court a second time, the

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judgment of the court below was reversed, and the probate declared to be sufficient. Vide 10 Yer.

On the third trial, the only material question was, the priority of registration.

The defendants produced the original deed, (at the first and second trial a copy was used.) The endorsement on the deed, purporting to be a certificate of registration, by John J. Hayter, D. R. was rejected by the court.

The defendants then introduced Mr. Hayter to prove the time when the deed was registered. This was objected to by plaintiff, but the objection was overruled, and H. examined as a witness for the purpose aforesaid; and the Judge charged the jury that it was competent to prove the time of registration by parol.

It is believed by the plaintiff in error, that it would be just as competent to prove the fact of registration by parol, as to prove the time when it was done by parol.

The decision of the circuit judge is so palpably erroneous, as not to require authorities or argument to prove it.

JAMES CAMPBELL, for the defendant, said—The only question now presented, that is considered material to examine, is this. The mortgage deed under which defendants claim, was duly acknowledged and admitted to registration about the time it bears date. It was registered, but the register failed to fix a date on his book, showing the time when it was registered. John J. Hayter, the deputy register, proves in substance that he registered the deed before he went out of office, which was in 1825, and which is early enough to overreach the claim of plaintiff. His certificate on the deed shows the same fact, though it was rejected by the court as a certificate, on account of its alleged informality, though it is not seen for what reason. It is objected by plaintiff, that the time the deed was registered cannot be proved by parol, or by any other evidence, short of the register's books themselves. There is no statute requiring the register to state upon his book the date of the registration. So there is no statute requiring the clerk of a court to state the hour when a judgment is rendered; and hence, whenever it becomes important to ascertain at what time a judgment was rendered, so as to determine whether a

judgment or a deed, both dated on the same day, claims priority, you resort to parol evidence to ascertain the fact of priority. The principle involved in this question is settled in *Murfree's Heirs v. Carmack & Williams*, 4 Yer. 270.

Starkie, part 3, p. 576, parol evidence may be used concurrently with written evidence.

Evidence may be adduced to prove a bond was given at a different time from its date. 2 Starkie, 572, 573.

TURLEY, J. delivered the opinion of the court.

January 28.

The plaintiffs and defendants claim title to the premises in dispute, under John Dougherty.

The plaintiff, by virtue of a sheriff's deed of conveyance, dated 8th of June, 1825, and registered 14th July, 1828; the defendants, by a deed of mortgage from John Dougherty, dated 6th of March 1820, and registered in the register's office of Franklin county, in Book F., pages 327, 328, 329, which registration is signed by John B. Hayter, D. R., and dated March 7, 1820.

This court has heretofore determined in this case, that the date of the registration cannot be established by the signature of John Hayter, he not being an officer recognized by the law; and upon the trial in the court below, from which this appeal is taken, Hayter was introduced as a witness, and proved the registration of the deed of mortgage to have been made on the day mentioned.

To the reception of Hayter's testimony, the plaintiff objected, which objection was over-ruled.

The only question now presented for re-consideration is, whether, when the register neglects to state on his books, the date of the registration of a deed, it may be proven by parol? We think it may, or otherwise, persons may be deprived of their estates, by the mere negligence or fraud of a ministerial officer, without any neglect or default whatever on their part, a conclusion certainly to be avoided.

This court, in the case of *Murfree's Heirs vs. Carmack & Williams*, 4 Yer. 271, held that where a judgment was rendered against a person on the same day, on which he executed a deed of conveyance for his land, proof of the precise pe-

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riod of the day when the judgment was rendered, and the deed executed was admissible to determine which had priority.

This case we think stronger than the one now under consideration, and as conclusive upon the point debated. We, therefore, think there was no error in receiving the testimony of Hayter, and affirm the judgment of the court below.

MILLER vs. MILLER.

CONVEYANCE. Operation of our statutory deed made by husband of land the joint property of husband and wife—Statute of limitations.

Our statutory deed does not operate—like the ancient feoffment—to pass the fee simple and turn all other estates into rights of entry or action. It operates—as a grant—to pass nothing but what the bargainor may lawfully sell. See Burrow, 92. Therefore a husband's deed, acknowledged, or proved, and registered, of land in the joint seizin and possession of him and his wife, is not a discontinuance of her estate. The bargainee's possession is not adverse to her right any more than her husband's was, but is consistent with her right, as was her husband's. Consequently the statute of limitations does not begin to turn the bargainee's possession into title against her, till her discovery, after which her title will be barred by the adverse possession of her husband's bargainee in seven, and not in three years.

Ejectment in Franklin circuit court for three hundred and twenty acres of land on Bean's creek in that county. Archibald Woods being seized and possessed of the premises, by indenture executed on the 2d of October, 1817, "in consideration of consanguinity, natural love and affection and one dollar to him in hand paid by Garland B. Miller and Mourning Miller his wife," conveyed said premises to them in fee, they being his daughter and son-in-law. This deed was duly acknowledged and registered in Franklin county.

On the 6th of May, 1827, Garland B. Miller, by his separate deed of that date, conveyed the premises to John Miller for the expressed consideration of thirty-one hundred and forty-nine dollars; and John Miller was put in possession. On the 20th of October, 1830, John Miller sold the premises for three thousand three hundred and eighty-four dollars, to Richard C. Holder, who gave his notes for the money, and took Miller's bond conditioned to convey the land to him

whenever he paid the consideration. The possession was now transferred to Holder.

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In December, 1832, Garland B. Miller died, his wife, Mourning, surviving him.

On the 8th of September, 1837, Mrs. Miller commenced this ejectment. Notice of the action was served on Richard C. Holder; and at March term, 1838, he and John Miller were admitted to defend instead of the casual ejector, upon entering into the common rule.

At the June term the cause was tried before his Honor Judge MARCHBANKS and a jury of Franklin. The deeds and bond above recited were read to the jury; and they were respectively proved to cover the premises, and it was also proved that the defendants were in possession thereof at the commencement of the suit.

His Honor charged the jury that the deed from Woods to Miller and his wife conveyed to them as one person the title to the land, which, upon the death of the husband continued in the lessor of the plaintiff; that the deed, notwithstanding the coverture, conveyed to her a present right; that Miller, the husband, might have leased, rented or assigned the land for any period not extending beyond the continuance of the marriage between him and his wife, and the assignee's, lessee's or tenant's possession would not have been adverse to the right of the lessor of the plaintiff, but would have been consistent with it; and her cause of action would not, upon that supposition, have accrued till the expiration of the term of the lease, renting or assignment,—and consequently the statute of limitations would only begin to run from that time.

But the deed of the 6th of May, 1827, from Garland to John Miller purported, his Honor said, to convey to the latter a fee simple in the land; that it could not therefore be considered as a lease or assignment of the premises for such time as Garland B. Miller had a right to lease or assign it; that John Miller's possession, under the deed, would consequently be adverse to the right of the lessor of the plaintiff, and her right of action accrued at the moment of the commencement of such possession; and that, if John Miller, or his assigns had had seven years possession of the land, claim-

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ing under said deed, before the commencement of the suit, such possession would be a bar to the action, unless it was commenced within *three* years next after the discoverure of the lessor of the plaintiff.

The jury found a verdict for the defendant. The plaintiff's motion for a new trial was overruled, whereupon she appealed in error.

January 23.

TAUL for the plaintiff in error, insisted that the statute did not begin to run against her right until the death of her husband, at which time, by the operation of law, the estate was cast upon her. There is no principle better settled than that the statute does not begin to run until there is a cause of action. Cooke's Rep. 318; 4 Bacon, 479, in note. The time to form the bar commences with the capacity to sue. *Bradford vs. McLemore*, 3 Yerger, 318; *Dyche vs. Glass' lessee*, 3 Yerger, 379; *Neddy vs. The State*, 8 Yerger, 251; 4 Bacon, 479; *The Commonwealth vs. McGowan*, 4 Bibb, 63; 5 Littell, 312; Sugden on Vendors, 343, 337; 2 Saunders, 338, note 9; Angel, 54, 55; 7 East, 299.

Mrs. Miller having, according to these authorities, no right of entry, until the demise of her husband, consequently the statute if applicable to her case, did not begin to run until then. Authorities might be multiplied upon this point, but it is considered to be wholly unnecessary.

2. At what time then did Mrs. Miller's right of entry commence? The answer is at the death of her husband. The conveyance was made to them during coverture. Each was seized of the entirety. In other words, it was a conveyance to the husband during life, remainder to his wife on the contingency of her surviving him. 2 Kent, 111, 112; *Taul vs. Campbell*, 7 Yerger, 319. By marriage the husband acquires the usufruct of the freehold estates of his wife, &c. Reaves' Dom. Rel. 27; Coke Lit. 351. If husband and wife are entitled to land, in right of the wife, of which they are disseized, and the disseizor dies and the lands descend to his heirs, the husband's right of entry upon the lands is taken away. If the husband dies before the wife, her right of entry is not taken away. Coke Lit. 246; Reeves, 29. The conveyance of the real property of the wife by the husband

operates only to convey his interest therein, although the deed should be of the fee, and the wife or her heirs may enter thereon on the death of the husband. Reeves, 121; 1 Bacon, 495.

The defendants contend that three years will form the bar, under our statute of limitations. The saving of three years, in favor of *femes covert* is where their right had accrued, come or fallen *during coverture*; and then although seven years had elapsed, they are entitled to three years more. Mrs. Martin's right did not accrue, come or fall until the death of her husband, *ergo*, she is entitled to seven years. Reeves, 121; 1 Bacon, 495. When the wife joins with the husband in the conveyance of her lands, which does not bind her; after the death of her husband, she may enter thereon without any more impediment than if she had never leased it. Reeves, 122; Roll's Ab. 349. If lands be given to husband and wife, and the heirs of their bodies, and the husband alone levies a fine thereof, the wife may enter after his death. 1 Bacon, 495, in note; Jacobs Law Dict. title Discontinuance. Recovery suffered by husband alone is void. *Id.* Coke Litt. vol. 2, title Discontinuance; Liber, 3, c. 2, § 594.

At common law, any alienation made by the husband of the wife's land was a discontinuance. 1 Bacon, 496. But by statute 32 Henry VIII, no fine shall work a discontinuance. If lands be given to husband and wife, and the heirs of their two bodies, and the husband maketh a feoffment and dieth, the wife is helped by statute 32 Henry VIII, and so is the issue of their bodies. Jacob, title Discontinuance; 2 Kent, 111, 112; Runnington, 45. The husband cannot alien or encumber it so as to prevent the wife or her heirs from enjoying it after his death. 2 Kent, 112. The intervention of a particular estate will suspend the operation of the statute. Angel, 157. Where the husband conveys without the wife, the statute will not begin to run against her dower until the death of her husband. Angel, 157. In this State, the statute does not run at all against a widow's claim to dower. *Guthrie vs. Owen's heirs*, 10 Yerger, 339. The reasoning of the court in this case will apply with all its force to the case now

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under consideration. Mrs. M. certainly had no right of entry previous to the death of her husband, and consequently the statute could not be running against a right that did not exist. In a late case in Pennsylvania, the supreme court said that they could not assent to the doctrine that when the husband conveys without the wife joining, the statute of limitations runs during the coverture. Angel, 158; *Callen vs. Motzer*, 13 Serg. and Rawle, 356.

JAMES CAMPBELL on the same side, argued, that by the common law, if a tenant holding an estate for life, or other less estate, makes a feoffment in fee, this was a forfeiture of the life estate, and he who was entitled to the reversion or remainder could enter upon the land. Hence, a feoffment in such a case did operate a disseizin, and the feoffee's possession became immediately adverse to those that were to come in after the person holding the particular estate. But when a different mode of transferring the title to real estate was introduced by the deed of bargain and sale, or other conveyance operating under the statute of uses, the rule which had before prevailed was no longer applicable. The deed of bargain and sale transferred the title without livery of seizin; and when the bargainor made a deed for a greater estate than the interest he had to convey, such deed operated to transfer such interest and such only as the bargainor had to convey. The bargainee would then enter not as a trespasser, but he would enter rightfully under his deed, and would hold in conformity with it till the interest which his bargainor had to convey, and which was transferred to his bargainee, had terminated. 4 Kent's Com. 80, *et seq.*; 2 Coke Lit. 415, § 416, *et seq.*; 2 Bla. 274, 5; 2 Kent's Com. 111, 112; *Jackson ex dem. Linebaugh vs. Sears*, 10 J. R. 435.

A grant even at the common law passes such estate as the grantor had to convey, because the estate which the grantor had to convey did not lie in livery, in other words, it passed without livery of seizin. 4 Cruise, 57, § 40, and the authorities there cited.

In this State deeds operate under our statute of 1715, c. 38, precisely as the deed of bargain and sale operates in England. It operates to transfer the legal estate without livery

or seizin. It operates as a grant at the common law, and the person making the conveyance is called, and properly too, the grantor or bargainor. Here, when the grantor conveys a larger estate than is vested in him, the deed or grant operates to transfer the interest of the grantor or bargainor, and the bargainee, when he enters, does so not by wrong, but by right. He does not enter as a trespasser, claiming under one who has forfeited his title, but he enters rightfully, claiming the possession under the deed of his bargainor or grantor, and who had the right to transfer him the possession. What would a deed of bargain and sale be in this country without the aid of the statute of uses or our own act of 1715? It would transfer no title, but a mere equity to the land. Our statute of 1715, like the statute of uses in England steps in and converts this equitable into a legal estate, and says that deeds made in conformity with the statute shall pass estates in land without livery of seizin. In other words, it shall pass such interest as the bargainor had to convey, for the very definition of the word estate, is such interest as the party conveying has in the thing conveyed. Our statute of 1715 does not narrow the operation of a deed of conveyance more than the statute of uses, but it enlarges its operation. It was intended to give freer scope to the transfer of real estate than was even given by the statute of uses. It does away with certain technicalities which even the statute of uses required, and both statutes dispense with the necessity of livery of seizin. Corporeal as well as incorporeal hereditaments in this State lie in grant and not in livery. They are transferred by grant or deed and by that alone.

Let us apply these principles to the present case. Garland B. Miller and wife had the estate in controversy conveyed to them by Woods. Garland B. Miller, in the lifetime of his wife, conveys the land to John Miller by deed, without his wife joining. John Miller took possession under this deed. Garland B. Miller, during the life of himself and wife, had the right to the land, and could rightfully transfer his possession to John. John when he entered did so not as a trespasser. He did not enter under a deed which conveyed no title, under a deed which forfeited the whole es-

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tate, which was wholly void, and which gave Mrs. Miller or Garland B. Miller and wife the right of immediate possession, the right to sue John Miller and recover the property; but when John Miller entered, he took possession under a deed which transferred the present estate, and the contingent fee simple which Garland had in the event he survived his wife. Had the wife died first, the estate in John Miller under his deed from Garland would have been complete. The deed from Garland in that event so far from operating, under our law, to transfer no estate, would have vested in him an absolute title in fee simple. The case of Jackson on the demise of *Sinsabaugh vs. Sears*, 10 Johnson's Rep. 435, fully sustains the principles here contended for. And if we are correct in these positions, of which, I think, there can be no doubt, then no right of action accrued against John Miller or his tenant, until the death of Garland B. Miller; until then the right of possession was in John Miller, and of course the statute of limitations could not begin to run against Mrs. Miller until the death of her husband; and seven years not having elapsed after that time, and before the commencement of this suit, she has the right to recover the land in controversy.

F. B. Fogg for the defendant, said that Miller and wife were jointly seized, not of moieties but of entireties. 7 Yerger, 319; 1 Roper, 52-6; 2 Black. 182; 2 Coke Littleton, 326 a. The wife has an inheritance even in the lifetime of her husband. 3 Coke, 142, 140, Beaumont's case; 2 Inst. 342; 1 Roper, 56. See 1 Roper, 3, as to the interest the husband acquires in the wife's property by marriage. He is tenant of the freehold in his own right, and the wife cannot sue without him, and yet the statute runs. Angel, 141. If husband sells the wife's land, he is estopped from suing; if a third person sells and he refuses to sue, she cannot sue, and yet the statute runs. In this case, the books say that by the death of the husband, the wife acquires no new estate, nothing she had not before. It is the same estate, the entirety which she had before. The entirety does not first vest by the death of the husband. 9 Co. 140; 2 Preston on Abstract of Titles, 39 to 57. Here is no case of a particular estate.

It is true the deed of the husband is void or inoperative as

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against the wife surviving, but this does not prevent the effect of an adverse possession during coverture. To use the words of Judge Swift in *Bunce vs. Wolcott*, 2 Connecticut Reports, 27, "Nor is the proposition correct, that the statute never begins to run against a person under a disability. Suppose the party claiming is an infant when the title accrues; if fifteen years (the period of the statute of limitations in Connecticut) run during his infancy, he has but five years, after he comes of full age, to make his entry. This clearly shows, that the statute operates against him during the disability. Indeed the statute always begins to run against a man the moment he is disseized, whether he is under a disability or not."

The language of the statute is susceptible of but one construction. That a person who is the owner of land at the time of disseizin, if laboring under disability of coverture, shall have three years from the time she becomes discovert. See *Griswold vs. Butler*, 3 Connecticut Reports, 144. A deed purporting to convey an estate in fee simple, registered and possession taken under it, operates as a disseizin. 5 Mass. Reports, 352; see *Greeneley's case*, 8 Reports, 72. "If she surcease her time, and five years pass after the death of the husband, she is barred of her right, and by consequence she cannot enter." *Dyer*, 72, b; 2 *Preston*, 50, 51.

The wife's right and title first accrued during her coverture by the deed to her and her husband. This deed operated as a disseizin, and as he would not or could not sue with her during coverture, the statute gives her three years after discoverture to bring her suit. Having omitted to sue during that period she is forever barred.

Where during coverture, a lease for years is granted to the wife, and the husband survives, an adverse possession commencing during coverture may be treated as adverse to the wife. *Doe ex dem. Williams vs. Williams*, 5 *Neville and Manning*, 434.

REESE, J. delivered the opinion of the court.

If during coverture the husband, by deed purporting to convey the fee, alien the land of the wife, or land jointly owned by himself and wife, and the bargainee enter into pos-

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session, is the wife barred by the statute of limitations, unless within three years after the death of her husband, she commence her action; or is she barred only by seven years adverse possession, after her discoveriture?

It is admitted by those who insist upon the bar of three years, that neither the wife alone, nor the husband and wife together, have, in the case stated, any right to enter or any cause of action during the coverture; and it is conceded, that if the deed of the husband had in the case before us, conveyed only the interest of the husband during the marriage, the wife would have been allowed seven years after his death in which to bring her suit. It is, then, the form of the husband's deed, as purporting to convey a fee, which is supposed to produce the evidence. A deed, under our act of 1715, when registered, operating, it is said, to convey the estate, not under the statute of use, but by its own proper force as an ancient deed of feoffment, possesses the efficacy ascribed to that assurance, and is therefore a *disseizin* of the wife, in the sense in which that term is used in the old common law books.

The legal existence of the wife, during marriage, being suspended, or the husband containing within himself the entire legal existence of both, the effect of the relation was, that if the husband by fine or feoffment alien the lands of the wife, owned by her in her own right, or jointly with him, she could not during the coverture enter, nor could she enter upon the death of the husband, but was put to her action *curi in vita* in the nature of a writ of right. Littleton, § 594.

But this discontinuance of the wife's estate, produced by the fine or feoffment of the husband, was subsequently to the time of Littleton, altered by the statute of 32 Henry 8, by the purview of which statute, Lord Coke informs us, that the wife and her heirs, after the decease of her husband, may enter into the lands and tenements of the wife, notwithstanding the alienation of the husband, and this, as well in the case where the lands were jointly held by husband and wife, as when the fee belonged to the wife alone. Subsequently, therefore, to this statute, the wife and her heirs had twenty

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years, after the death of the husband, in which to enter, or bring a possessory action, except in the single case of a fine levied by the husband with proclamations, when the wife must enter and avoid the estate of the conusee within five years after the death of the husband, or else she is barred forever by the statute of 4 H 7; for, says Lord Coke, the statute of 32 H. 8, "doth help the discontinuance, but not the *barre*; and the statute speaketh of a fine, and not of a fine with proclamations." Com. of Coke, upon § 594, Liber, 3, cap. 11.

Subsequently, therefore, to the 32 Henry 8, the wife, with the single exception above stated, might after the death of the husband, within twenty years enter, or bring her possessory action, and avoid the fine or feoffment of the husband made during the coverture; and of course, in this state, even if it were conceded that a deed of the husband made under the act of 1715, and registered, has the efficacy of the ancient deed of feoffment before the statute H. 8, and would operate the disseizin and discontinuance of the wife's estate, still, by virtue of that statute, the disseizin and discontinuance are avoided, and she may enter or bring her possessory action within seven years. For it will scarcely be contended by those, who ascribe to a deed, under our statute, the efficacy of the ancient deed of feoffment, that the statute of 32 H. 8, is not in force here, for the effect of that would be, as we have no writ of *cui in vita*, &c. or writ of right, that the husband's deed would operate a disseizin and discontinuance of the wife's estate, absolutely and forever. This simple view of the subject is clearly decisive of the case before us, and we might well terminate at this point, our consideration of the question.

2. But the efficacy ascribed in ancient times to a deed of feoffment was founded upon feudal principles which the courts in England now declare to have lost their operation, and to have no further existence, and they deny to a feoffment its ancient and dangerous efficacy.

In the great case of *Taylor ex dem: Alkyns vs. Horde & others*, 1 Bur. Rep. 60, which was much considered and decided, "with infinite ability," as Mr. Butler admits, even

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when in his own annotations upon Coke, he is impugning its conclusions, Lord Mansfield says, "that except the special case of fines with proclamations, which he observed, stands upon distinct grounds, and the construction of the statute, 4 H. 7, c 24, for the sake of the bar, he could not think of a case where the true owner, whose entry is not taken away, might not elect, by choosing a possessory remedy, to be deemed as not having been disseized." Bur. 112. And the judges of the King's Bench, in the opinion delivered by them in 1784, in the same case, express themselves still more strongly on this head. "They say, that "where the books speak of feoffments in fee by tenants for years, and that the fee simple passes thereby, it is to be understood of those feoffments of old, attended with livery, and actual transmutation of the possession from one man to another; that feoffments from having been the only conveyance of land for a long term of years, have languished into mere form, and are nothing now more than a common conveyance; that their grandeur and efficacy is lost; and that without actually transferring of the estate from one man to another, they mix with the community of all other assurances; that the name of these feoffments and the remembrance of them, remain and survive them however imperfectly, after the practice of making them, and consequently their solemnity is quite at an end."

This decision not only did not meet the sanction, but received the severe criticism of Mr. Butler, Mr. Preston, and other property lawyers in England, who are wont to cast a long and lingering look towards the departing glory of the ancient learning, to the analysis of which they have devoted so much time, toil and talent. In this censure they are joined by Chief Justice PARSONS, of our own country, whose professional character was strongly marked by their own sturdy features, who had drank deeply at the same fountain of ancient learning, and who, perhaps, largely participated in their feudal sympathies.

But notwithstanding the opposition of property lawyers in elementary disquisitions and in discussions at the bar, the opinions of Lord Mansfield, and the judges of the King's Bench in *Taylor vs. Horde*, have received the subsequent

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confirmation of the English courts. In the case of *Jerrett vs. Weare & others*, 3 Price 575, Exchequer Reports, argued by Mr. Puller and Mr. Preston, Graham, Baron, says, upon this question, that "a load of knowledge" had been brought forward in the argument, but the principle of the case of *Taylor vs. Horde*, rested upon grounds which were not to be shaken. And in the case of the *Lessee of Maddock vs. Lynes*, 3 Barn. & Cre. 306, Abbott, C. J. (since Lord Tenterden,) said, there was so much good sense in the doctrine laid down by Lord Mansfield, in the case of *Taylor vs. Horde*, that he should be sorry to find any ground for saying it could not be supported. Holroyd, J., said, "that the passages cited from Littleton & Coke, upon the general nature of disseizin are considered by Lord Mansfield to apply to disseizin by election." He adds, "that the greatest mischief might arise if such conveyances were to operate against parties really interested." And he remarks, "that the nature of a feoffment and disseizin are materially altered since the time when Littleton wrote;" and some of the judges in that case, which was decided so late as the year 1824, seemed to question the authority of the case of *Taylor vs. Horde*.

So that the conclusion of Chancellor Kent seems to be well founded, that the good sense and liberal views which dictated the decision in *Taylor vs. Horde*, seems to have finally prevailed in Westminster Hall, notwithstanding the strong opposition which that case met with from the profession. And he adds the sanction of his high authority to the principle of that decision, by remarking, "that the courts will no longer endure the old and exploded theory of disseizin. They now require something more than mere feoffments and leases to work, in every case, the absolute and perilous consequences of a disseizin in fact." 4 Kent's Com. 475, first edit.; see also 10 John. Rep. *Jackson vs. Sears*, 435.

But if this controversy between the courts, struggling under the guidance of good sense and liberal principles, to escape from feudal shackles, and the property lawyers fondly and strongly clinging to them, had terminated,—or, being renewed, should hereafter terminate differently, we are, and will be, unaffected by the disastrous result.

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The object of our act of 1715, as it seems to us, was to abrogate and escape from the effects and consequences, as well as the forms and ceremonies of attornment, livery and seizin, &c. And if, as has been, we think, correctly determined, 2 Yer. R. 204, that though the title under our statute does not, on the one hand, pass by operation of the statute of uses, but by deed registered, yet still, on the other hand, such deed does not like an ancient feoffment work a disseizin. To do this, the statute in question requires not only a deed, but seven years adverse possession under it.

On every ground, therefore, we think, that judgment should be given for the plaintiff in error.

Let the judgment of the circuit court be reversed, and a new trial be had in the case, when the law will be charged in conformity to this opinion.

RICE vs. RAWLINGS.

CHANCERY. *Agreement—specific execution—award. Statute of Frauds.* A verbal agreement to receive real estate in discharge of a debt, will not be taken out of the statute of frauds by a submission to referees of the question—at what price it should be received—though the referees fix the price in writing under seal, in the shape of an award.

SAME. *Same.* If a creditor, having executed a mortgage or deed of trust, of certain town lots to secure the payment of a debt, refuse to acknowledge the execution of the deed so as to admit it to registration, and thereby extract from the creditor an agreement to receive the lots in payment, and a submission to referees of the question whether the creditor should receive the lots in payment at a price to be fixed by them, and an award be made accordingly, such agreement and award will not be specifically executed in chancery, because of the moral constraint under which the party acted in making the agreement and submission, and the violation of good faith whereby they were obtained.

The pleadings in this cause consisted of a bill filed by John Rice in the chancery court at McMinnville, on the 28th of April, 1834, and subsequently amended, against Daniel R. Rawlings and John Rogers, administrators of Alexander Ferguson, and their answers thereto; and of a cross bill filed by them against Rice at December Term, 1834, and his answer to it.

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Rawlings and Rogers, as administrators of Ferguson, had a demand against Rice, to secure which he had given them an imperfectly executed mortgage of certain lots in Jasper. He refused to perfect this security, however, so that it might be registered, and protect the lots against his other debts, but proposed to transfer them in fee to the administrators in satisfaction of their demand. They assented to this proposal, but disagreeing with him as to the value of the lots, they referred it to two persons to value them, and empowered them, if they disagreed, to choose an umpire. The valuation was made, and a memorandum of it handed to Rice, but the administrators believing it excessive, declined taking the lots.

About a month after the valuation, Rice drew up a paper,—recited in the opinion of the court,—in the form of an award, which he procured the valuers to sign. He then tendered the administrators a deed for the lots, which they refused to accept,—whereupon he filed this bill to have the paper specifically executed, *as an award, adjudging that the administrator should receive the lots in payment of the debt.*

The administrator answered, insisting that the paper in question was not, even in form, an award, as supposed in the bill; but if it was so in form, it was not in substance, because the persons by whom it purported to have been made, had not been authorised to adjudge the question, whether the lots should be accepted in payment, but only to value them.

And in their cross bill they prayed that the court would set up the imperfect mortgage and foreclose it.

The testimony of one of the valuers, who heard the conversation between Rawlings and Rice, which led to the valuation, was, that "*Rawlings requested Rice to rectify the deed. Rice said no,—he would convey the property to them to pay the debt. Rawlings said he would take the property at its value. Rice said he would choose one man, and Rawlings might another, and they should choose another if they did not agree.*" This was assented to, and Rice named the witness, and Rawlings another person, who proceeded to make the valuation as before stated.

The valuation was made on the 25th of June, 1833, at which time the principal and interest of the demand of the

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administrators against Rice, was \$1407 43 cents. The lots were valued at \$1500,—so that if the administrators should be compelled to take the lots, they would have to pay Rice \$92 52 cents.

His Honor, Chancellor BRAMLITT, who heard the cause, decreed that the notes held by the administrators against Rice should be delivered up to be cancelled; that they should pay Rice said sum of 92 dollars 52 cents, with interest from the 25th of June, 1833; that all the right and title of Rice in the lots be divested out of him, and vested in the administrators; that the crossbill be dismissed with costs, and that the parties each pay one half of the costs, &c. The administrators appealed in error.

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JAS. CAMPBELL, and LAUGHLIN, for the complainant, said the only question in the cause is, as to the statute of frauds, which is relied upon by defendants. It is believed that this statute can have no application. The award of the referees who valued the lots to defendants, was in writing; and the case is precisely similar in principle to that of the auctioneer, who makes out his list of sales under a verbal authority. The referees were the agents of the parties, and the award sets forth distinctly the agreement. But in addition to this—all that the Statute requires to be done by writing, has been done. Defendants agree to take the lots according to the award of referees. They make their award, and complainants thereupon executes the conveyance.

MEIGS, for the appellants, said that the decree was manifestly erroneous. The bill was founded upon the idea that the question—*whether the administrators should take the lots in satisfaction of their notes, at a price to be fixed by referees?* was a matter of controversy between Rice and them, which, having been submitted to a domestic tribunal, decided by it, and the decision reduced to writing, was *res judicata*, and a *writing within the statute of frauds*, and consequently ought to be carried into execution by this court. But he said that the question—“whether they should take the lots in discharge of the notes?” had not been a matter of dispute. The proposal to convey the lots in payment was made by Rice, and accepted by Rawlings; but disagreeing as to the value of the

lots, that question was referred,—nothing more or less. If the referees had assumed, as in fact they had not, to award a conveyance of the lots and cancelling of the notes, that far their decision would have been *coram non judice*. The sole question was, whether a verbal agreement to accept land in payment of a debt was good under the statute of frauds, a question too plain to admit of argument. For it had only been feebly urged that the relation between these referees and the parties was the same as that between principal and agent, or that between the auctioneer and the proprietor, and purchaser of property sold under the hammer.

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TURLEY J., delivered the opinion of the court.

John Rice, the complainant, was indebted to Alexander Ferguson, at the time of his death, in the sum of \$1364. On the 11th day of September, 1828, he executed to the defendants, as Ferguson's administrators, a deed of trust on three lots in the town of Jasper, Marion county, Tennessee, conditioned, that if he paid said sum of money in three several annual instalments, viz. Dec. 28th, 1831, 1832 and 1833, they should reconvey to him the lots, and if not, that they might sell the same and make the money.

This deed was subscribed but by one witness, and Rice refused to acknowledge it in open court; so that it could not be registered.

The administrators becoming apprehensive that the debt might be lost for want of registration of the deed, and finding, after repeated attempts, that no satisfactory arrangement could be made, agreed to a proposal made by him, to take the lots absolutely in payment of the debt, at a fair valuation; but they, not being able to come to a mutual understanding, as to what that was, agreed that they would choose two persons to estimate it, with liberty for them to choose a third as umpire, provided they could not agree.

The two persons not agreeing, chose a third, and the three estimated the value of the lots at \$1500, when the proof shows that at the time they were worth not more, at the extent, than \$1000. The defendants refused to receive a conveyance in fee, for the lots at the price assessed. This

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valuation was made on the 25th day of June, 1833; and on 26th day of July, the same year, the complainant, without the knowledge of the defendants, and in their absence, drew up a paper writing in the words following:

"We, the undersigned, being called upon by Daniel Rawlings, John Rodgers and John Rice, all of the county of Marion, state of Tennessee, for the purpose of valuing three town lots in the town of Jasper, containing one quarter of an acre each, known and distinguished in the plan of said town, by Nos. 84, 83, 75, against three notes of hand given by said Rice to said Rawlings and Rogers, administrators of the estate of Alexander Ferguson, deceased, amounting to upwards of \$1300, and to better secure the payment of said notes to said administrators as aforesaid, said Rice executed to them a deed of trust on said lots as above specified, bearing equal date with said notes, and to consummate and pay off said notes, agreeable to an understanding from each party, said notes, together with the deed of trust, was submitted to us on the 25th day of June, 1833, by said Rawlings and Rogers, and each party agreeing that our valuation should be final and binding on them, in consideration of said Rice reserving his bark mill and loose plank to himself, and the possession of the premises, until the 25th of December next, did then proceed and value said property to fifteen hundred dollars, on said 25th day of June, 1833."

This paper writing was signed and sealed by the persons who made the valuation on the day it was drawn up by the complainants, and it is now sought to be specifically executed as an arbitrament of the rights of the contending parties, by a decree compelling the defendants to receive the lots at the valuation of \$1500.

If this were an arbitrament which could be specifically executed by this court, we would refuse to do so, because the complainant, by a violation of good faith in refusing to acknowledge the deed of trust, constrained the defendants, by a kind of moral duress, to agree to receive the property at a fair valuation in discharge of so much of the debt as it might pay, for fear that for want of registration the security to the deed of trust might be lost.

The specific execution of contracts are decreed at the sound discretion of the court, and a party to be entitled to it, must come in with clean hands; this, for the above reason, the complainant does not.

2. But this is no arbitrament of conflicting rights between contending parties, by which debts can be paid and property passed.

The defendants had agreed that they would receive the lots at their value, and not being able to agree with complainant as to what that was, chose to submit the estimate to persons indifferently chosen by them, nothing more; and this is all that was done by them. They do not award, indeed they had no authority to do so, that the defendant should take the lots at \$1500, and that the complainants should be satisfied, and the surplus paid to him. The agreement to receive the lots at value was *in fieri* and not executed. Then there was the *locus penitentiae*; and upon no principle can the defendants be compelled to perform it.

3. And if this were an arbitrament by which the parties would ordinarily be bound, yet still it would be inoperative in this case; because, by the act of 1801, ch. 25, commonly called the Statute of Frauds and Perjuries, it is enacted "that no action shall be brought upon any contract for the sale of lands, tenements or hereditaments, or the making any lease therefor for a longer term than one year, unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith."

That there is no note or memorandum of the agreement to receive the lots in part payment of the debt due by complainant, is certainly true; but it is contended that the person chosen to estimate the value of the lots were the agents of both the contending parties, and the parol memorandum made by them at the time is to be considered as such. If they were the agents of the parties, their agency was special, being limited to the assessment of the value of the lots, and they, therefore, had no power to make a contract, or to bind the parties by any memorandum of one previously made. In this respect they occupy very different grounds from an auctioneer or agent to sell, inasmuch as they possess the power to con-

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tract for and bind their principal: provided they do not exceed their authority, and comply with the requisites and forms of law.

We are, therefore, of the opinion, that there is error in the decree of the Chancellor, and reverse it, and dismiss the bill.

WALKER vs. SKIPWITH.

PRINCIPAL AND AGENT. *Distinction between general and special agent—Stage contractor and agents—common carrier—limitation of liability of.* A general agent has authority, not unqualified, but to act for his constituent in a multitude of instances. A particular agent's authority is confined to a particular instance. 15 East, 408. The liability of a common carrier cannot be limited by secret instructions given to his general agent. When a stage proprietor has habitually carried in his coaches persons and baggage or packages, the regulations of his line and instructions to his agents not to receive goods to be carried, except as the baggage of passengers, or in the care of passengers, but at the risk of the owner or of the person sending them, will not limit his liability for goods received by his agents, unless the owner or his agent was notified of the rule or instructions at the time of the receipt of the goods.

In an *action on the case*, commenced on the 11th of April, 1836, in Maury circuit court, by Peyton H. Skipwith, against James Walker, the plaintiff, declared that whereas the defendant, on the day of February, 1835, was, and long before had, and since hath been, a *common carrier* of goods, chattels, persons and baggage, by a certain common stage coach or carriage, going and passing from the city of Nashville to the town of Columbia; and by himself and servants, hath been used and accustomed to carry the goods and chattels of all persons whatsoever requiring the carriage thereof from said city of Nashville to the town of Columbia, and also from the latter to the former, for certain hire or reward, to be therefor paid to the defendant; and the said defendant, so being such common carrier, on the day of February, 1835, at the city of Nashville, in consideration that the said plaintiff, at the special instance and request of the defendant, had delivered to the defendant a certain quantity of goods and chattels, to wit, one steel-mixed frock coat, of the value of

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forty dollars, one box cigars of the value of dollars, and one pistol of the value of eighteen dollars, to be safely and securely carried by the defendant from the city of Nashville to Columbia for a reasonable reward therefor, paid to the defendant for the carriage thereof, he, the said defendant, undertook and promised the plaintiff, safely and securely to carry and convey the aforesaid goods and chattels from Nashville to Columbia: and although the defendant then and there received the said goods to be conveyed and carried as aforesaid, yet, not regarding, &c. did not safely and securely carry and convey the said goods and chattels from Nashville to Columbia, but so carelessly and negligently and improvidently behaved himself in and about the carriage thereof, and took so little and such bad care thereof, that by and through the mere neglect and default of the defendant and his servants, by him employed in and about the carriage thereof, the said goods were wholly lost, &c.

The defendant pleaded not guilty, and issue was thereupon joined. On the trial, at January Term, 1838, before his Honor Judge DILLAHUNTY, and a jury of Maury, the plaintiff proved by Orange Swan, that in the month of February, 1835, he put the articles described in the declaration in a box,—which box he delivered at the bar of the City Hotel in Nashville, to Mr. Lyle, who was then acting there as barkeeper, and also, as he had reason to suppose, as stage agent, with directions to forward it by the mail stage to Skipwith at Columbia; that he paid Lyle fifty cents for the transportation of the box; that Lyle said he would have the box entered on the way bill; that Lyle did not then, or at any previous time, tell him that the contractors would not be liable for any baggage unless under the charge of passengers; but that he did tell him so repeatedly after he knew that the box had been lost; and that at the time when Lyle told him that the box had been lost, he also admitted that he had not notified him of said rule of the contractors. The plaintiff also proved that Lyle was, at the time in question, stage agent for Walker, at his office at the City Hotel.

The defendant proved that it had been one of the rules and regulations of the line, and that Lyle and all his other agents

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at his office in Nashville, had been instructed, *that no package or parcel of any kind should be sent on the stage, unless it constituted a part of the baggage of a passenger, or was under the care of a passenger; except at the risk of the owner, or person sending such package or article.* Lyle swore that he had been so instructed, and, in consequence, had written a bill to that effect, and put it up at the bar. He also swore that when Swan brought the box, he notified him of this rule, but Swan said that Skipwith had directed him to send it by the first stage, and it would have to go at his risk; that Swan offered him fifty cents for the transportation of the package, and requested that it should be entered upon the way bill, but that he refused to receive the money or to enter the package; that Swan then called to the bar room servant to put the box upon the stage the next morning, which was done, as both the servant and the driver informed the witness. This was substantially the testimony submitted to the jury.

His Honor instructed the jury, that a common carrier was a person who carried goods, &c. indifferently for all persons for hire; that if a man undertook for hire to carry goods from one point to another, either by land or water, he would be held liable as a common carrier; that a common carrier was liable for all losses or damages, except for those which happened by the act of God or the public enemies of the country; that if the defendant was in the habit of carrying goods for hire in his stages under any special limitation or restriction as to his liability, notice thereof must be fixed upon the plaintiff or his agent at the time the goods were received, or else the defendant would be liable as a common carrier; that no private instruction of the employer to his general agent would be binding on the plaintiff, unless he or his agent were notified thereof; that if Lyle was a special agent of the defendant, having power to receive passage money from *persons* who travelled in the stage, and nothing further, defendant would not be liable for *goods* received by him; for it was a principle of law that a special agent could not bind his principal by any act beyond the scope of his authority.

The jury found for the plaintiff, and assessed his damages at 53 dollars, 75 cents. The defendant moved for a new

trial, which was refused, and the court gave judgment upon the verdict, from which the defendant appealed in error.

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PILLOW and COOK for the plaintiff in error.

January 28.

CAHAL, for the defendant in error, said—The points raised by this record are, 1st, as to Walker's liability as a common carrier. 2. As to his right to have a general agent in his employment, with secret instructions unknown to those with whom he transacted the business of his principal; and 3d. The notice necessary to limit the ordinary responsibility of a carrier. As to what persons come under the denomination of common carriers, see 2 Kent, 598; 1 Saund. Pl. 320; Chit. on Con. 149; Comyn on Con. 294; Story on Bail. 322.

As to their liabilities, see 1 Stark, 202; 2 Kent, 597, 600, 1-2; 2 Comyn on Con. 291-2-3; Story Bail. 317 and 324-5. Jeremy's Law of Car. 11, 12, 24; 10 John. 1; 11 John 107. In Tennessee, Peck 260, and *Turney vs. Wilson*, 7 Yer. 340.

1. Whether Walker was a common carrier in the common law definition of the term, cannot affect the decision in this case. Perhaps, in the strict sense of the term, there are few persons in this country who fall under the denomination. The question, whether a man is a common carrier or not, can only arise in an action on the case where a carrier has refused to transport goods when the freight has been tendered to him. But whether he is a carrier or not, if he does undertake to carry goods for hire, he is liable as a common carrier. No matter what his ordinary occupation may be, the undertaking to carry goods for hire does, *pro hac vice*, constitutes him a common carrier, and of course makes him liable for losses not occasioned by the act of God or a public enemy; and the burden of proof is thrown upon him to show that the loss was occasioned in a manner that will exempt him from liability. In the case of *Turney vs. Wilson*, 7 Yer. 340, the court say: "It has so frequently been holden by this court, that one who undertakes for a reward, to convey goods, or produce of any sort, from any place upon the river to another, becomes thereby liable as a common carrier, that it is only necessary to refer to the cases." It was not even mooted in that case, that if Turney had undertaken to carry by land for hire, he

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would have been subject to all the liabilities of a common carrier, but it was insisted that there was a special exemption in favor of flat boat owners on the Mississippi, and that the principles of the common law of England, established to regulate transportation on the comparatively little rivers of Great Britain, were wholly inapplicable to the unknown dangers of the Mississippi, with its constantly shifting channel, its sawyers, cut offs and eddies; and that as human skill and sagacity could not avoid many of the perils incident to the ever-changing current, and falling in banks of this great river, a special custom among boatmen might exist as to the meaning of the words "dangers of the river," and that the court ought to allow proof of the custom, and apply a new rule to limit the ordinary liability of a carrier; and hence we find the rule laid down in this case as applicable to carriers by water. It was always the same by land. The policy on which the rule is founded as necessary, is equally applicable to every species of transportation, and Kent, vol. 2, page 608, says explicitly, "there is no distinction between a carrier by land and a carrier by water, whether the water navigation is internal or foreign.

2. On the question of agency, see Paley, 162-3-4-5-6; 2 Kent, 620-1; Chit. Con. 58-9; Reeves, 368; 15 Johns. 53-4; 15 East, 400.

Kent lays down the correct rule, which is supported by the other authorities. In treating of the powers of a general and special agent, in vol. 2, p. 620, he says, "The acts of a general agent; or one whom a man puts in his place, to transact all his business of a particular kind, will bind his principal so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary to prevent fraud and encourage confidence in dealing."

On the question of notice limiting the ordinary responsibility of a carrier, see Chit. on Cont. 153; 1 Saund. 333; 2 Kent. 606; Storey on Bailm. 357; 2 Stark. 203.

Chitty lays down the law, on the authority of an adjudicated case, that "it lies on the carrier, when sued for the loss of goods, to adduce clear and explicit evidence, fixing the plain-

tiff, or his agent, with full knowledge of the existence of the particular notice by which such carrier attempts to obviate or limit his presumed liability."

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Kent, vol. 2, p. 606, says: "According to the modern English doctrines, which may be applicable with us, carriers may limit their responsibility by special notice of the extent of what they mean to assume. The goods in that case are understood to be delivered on the footing of a special contract, superseding the strict rule of the common law; and it is necessary in order to give effect to the notice, that it be previously brought home to the actual knowledge of the bailee, and be clear, explicit and consistent."

At page 607, he says: "The English judges have thought that the doctrine of exempting carriers from liability had been carried too far; and its introduction into Westminster Hall, has been much lamented." He says he "does not know whether the doctrine has been judicially established in this country, but presumes it will be, as there seems to be a disposition to abate the severity of the English rule."

These authorities, it is conceived, sustain the charge of the court, and the facts warranted the verdict of the jury.

GREEN, J., delivered the opinion of the court.

In this case the law was stated with great accuracy and January 29. precision by the circuit court, in the charge to the jury. But although no exception is taken to the charge of the court, it is contended, that the evidence shows Lyle, to whom the box was delivered, to have been a special, and not a general agent of the defendant, because he was not authorised to forward goods by the stage, unless they were put in charge of some passenger, and therefore the jury found a verdict contrary to the law.

In order the better to apply the facts of this case to the principles of law, we will consider what is a general and what a special agency.

"By a general agency is understood, not merely a person substituted in place of another, for transacting all manner of business, since there are few instances in common use of an agency of that description, but a person whom a man puts in

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his place to transact all his business of a particular kind, as to buy and sell certain kind of wares, to negotiate certain contracts and the like." Paley on Agency, 162-3. But a special agent is where one is employed about "one specific act, or certain specific acts only." Paley on Agency, 164.

It will be seen from this definition of a general agency, that if a stage contractor puts a man in his place to transact all his business of a particular kind, as to receive, and forward passengers and baggage in the stage, and to receive payment therefor, at any particular stand or stage office, such person is the general agent of the contractor or owner of the stage. In such case, though the owner of the stage may limit the agent by a private order or direction, still he is bound for all his agent's acts, though not conformable to his direction, if within the scope of his employment, unless this limitation upon the power of the agent be known to the party dealing with him. Paley on Agency, 163.

It is not therefore a limitation, by private instructions to the agent, that constitutes a special agency. That is a matter between the principal and agent alone, unless it be disclosed to the party dealing with the agent. If the agent has not acted in conformity to his commission, he is responsible to his principal. By placing the party in the situation of a general agent, the principal has been instrumental in producing the injury through his agent's misconduct, and he ought to suffer for it, rather than a stranger, who is equally innocent with himself.

Apply these principles to the facts of this case, Lyle was the agent of the plaintiff in error, to receive money for him at Nashville, for the transportation in his stages of passengers, baggage, packages, and whatever else they were in the habit of transporting in the stage. But he was instructed to send no baggage, or package, unless it were under the care of a passenger. Now, this constituted him a general agent, for a "general authority," says Lord Ellenborough, "does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." *Whitehead vs. Tuckett*, 15 East. 400. Therefore if a general factor sell for a less price than

he is authorised to take, his sale is nevertheless valid. So if he have usually been employed to purchase silks, and he buy a commodity of a different kind, the principal is chargeable. Paley; Agency, 169.

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Had Lyle's agency, instead of extending to the business of the stage office in Nashville generally, been restricted to a few specific acts, his employer would not have been bound, unless his authority had been strictly pursued, for then it would have been the business of the party dealing with him to examine his authority. Paley on Agency, 164. But when he was constantly in the habit of receiving money for the transportation of baggage, packages, &c., and superintending and giving directions as to who, and what should be conveyed in the stages, thus exercising a general agency in the business, how was the public to know that he had private instructions never to send articles except in charge of a passenger?

If such instructions, in such a case as this, would excuse the principal from liability, innocent persons dealing with an unfaithful agent, would be constantly liable to loss; while his principal, by employing, and giving him credit with the public, would be liable to no responsibility for his frauds, provided he had given him private instructions.

This would be reversing the rule of law upon this subject. The rule is, that where one of two innocent persons must suffer, by the fraud of a third, he who enabled that person, by giving him credit to commit the fraud, ought to be the sufferer. 3 T. R. 70.

We think there is no error in the judgment, and order it to be affirmed.

MITCHELL vs. MILLER.

JURISDICTION. *Justice's by act of 1837, c 22, § 1.*—By the act of 1837, c 22, § 1, extending the jurisdiction of justices of the peace, their jurisdiction is confined to the case of a liability arising directly out of the instrument itself; and does not embrace an indirect, collateral or contingent liability, created not by the terms of the instrument, but by operation of law,—as the liability of an endorser, &c.

W. H. Sneed, on the 2d of June, 1837, executed his bill single for one hundred and fifteen dollars, payable to C. G. Mitchell, or order, on or before the first day of April, with interest from the first of January, 1838. Mitchell, the payee, endorsed it on the 12th of April, 1838, to D. Mitchell, waiving demand and notice; and on the next day, D. Mitchell endorsed it, in like manner, to Alfred Miller. On the 5th of May, Miller sued D. Mitchell upon his endorsement before a justice of Rutherford, who gave judgment for the plaintiff. The defendant appealed to the circuit court, in which it was tried at July term, 1838, before Judge RUCKS, sitting for Judge ANDERSON, and a jury. On the trial, the defendant objected to the reading of the bill and endorsements to the jury, but his Honor admitted them, and the jury found a verdict for the plaintiff. The defendant moved for a new trial, which was refused, and judgment given. The defendant filed a bill of exceptions setting out the bill and endorsements, and appealed in error to this court.

SNEED for the plaintiff in error said—This is a suit by the endorsee of a note against the endorser, and unless some act of our legislature has authorised the bringing a suit by and against persons standing in this relation to each other before justices of the peace for the sum claimed and recovered below in this action, then this judgment must be reversed. In 1809 the legislature extended the jurisdiction of justices upon settled accounts signed by the party to be charged, and upon notes, &c., from fifty to one hundred dollars. The act of 1835-6, giving justices jurisdiction to the same amount in such cases is couched in language substantially the same as the act of 1809. The same may be remarked of the act of 1837, c. 22, § 1. Until the passage of the latter act, justi-

ces had in no case jurisdiction beyond one hundred dollars, and unless it authorizes the bringing of the present suit, it must fail. Neither of the acts above recited mention the case of an endorser; and it is believed that the opinion has universally prevailed among the members of the profession, that they were not included. The construction of the above acts by the circuit courts, it is thought, has been the same. The passage of the act of 1831, giving jurisdiction to one hundred dollars to justices, as between endorsee and endorser, proves that the act of 1809 had received from that body a similar exposition. But in addition to all this, the case of *Smith and Peebles vs. Wallace and Hobbs*, 4 Yer. Rep. 572, settles the construction of the acts previous to 1833. The act of 1809, c. 54, extended the jurisdiction from fifty to one hundred dollars, and a case circumstanced as the present, is not included. The act of 1837 extends the jurisdiction from one to two hundred dollars, and as it employs "*mutatis mutandis*," the same words as the former acts, it cannot cover this case.

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No counsel appeared for the defendant in error.

REESE, J., delivered the opinion of the court.

The general question arising in the case is, whether the first section of the act of 1837, c. 22, confers upon a justice of the peace jurisdiction in any case where the writing which evidences the contract, creates a liability which is indirect and collateral?

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The words used in that section are, that "a justice of the peace shall have concurrent jurisdiction of all debts and demands from one hundred to two hundred dollars, where the balance is due upon any specialty, note, agreement, or settled account signed by the party to be charged therewith."

These terms, we are of opinion, extend to and embrace only a direct liability, ascertained and evidenced by the signature of the party to the specialty, note, agreement or settled account; but do not extend to, or embrace an indirect, collateral, or contingent liability, created not by the terms of the agreement, but by the operation of the law.

The endorser, by the terms of the endorsement, transfers

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to the endorsee only the legal title to the note. His liability arises not from the terms used, but from the act done, and is produced by the operation of the law merchant. It is clear, therefore, that the liability does not fall within the terms or intention of the act conferring upon a justice of the peace the extended jurisdiction of two hundred dollars. If it had been otherwise, we may be permitted to remark, that every enlightened man must have deeply regretted it. For it would have been as absurd as hazardous to have submitted to these domestic tribunals so large a portion of the controversies arising out of the law merchant, with the difficult questions and nice distinctions which attend them.

2. In the case before us, the circuit court probably sustained the jurisdiction, because the endorsement in its terms waives the necessity for demand and notice. But although this would facilitate and simplify the evidence in this case, it still leaves the agreement to be raised by operation of law, and does not in terms create a direct liability.

We are of opinion, therefore, that the judgment of the circuit court be reversed. And this court proceeding to give such judgment as the circuit court ought to have given, arrest the judgment.

WOOD vs. JONES.

CHANCERY. *Trust direct—implied—Relation of mortgagor and mortgagee—Equity of Redemption—Statute of Limitations.* Even in case of a *direct* trust, and in a suit between trustee and beneficiary, the statute of limitations may be a bar to the claim of the latter. But the relation of mortgagor and mortgagee is not that of trustee and beneficiary. It stands upon grounds peculiar to itself. The mortgagee has the right of possession, and it is for himself from the first. But the mortgagor's equity of redemption does not depend upon that possession, and cannot be affected by it, or barred by the continuance of it, under whatever circumstances or pretensions, short of the time when a presumption of right will arise. But if the mortgagee sell the property, the purchaser, though at the time aware of the equity of redemption, will be protected by the statute; for though notice of the equity fixes him with a trust for the mortgagor, it is not direct but implied; and to enforce that species of trust, the beneficiary must sue within the time of limitation. For in such case the purchaser's possession is for himself, and his duty to the mortgagor does not arise out of the transaction whereby he acquired the possession, but is implied from the notice of his vendor's duty.

On the 10th of September, 1825, John L. Wood borrowed the sum of four hundred dollars from Benjamin M. Jones; and to secure the payment of the money executed to him a mortgage of a slave named Anderson, conditioned to be absolute if the money, with legal interest thereon, remained unpaid on the 1st of September, 1826. The contingency happened, and Wood very soon afterwards removed to Arkansas and subsequently to Texas.

Jones kept the negro till the 25th of January, 1830, when he sold him to Nathaniel Wooland, to whom he made an absolute bill of sale. Wood returned to the neighborhood of the parties in the year 1830, was informed of the sale to Wooland, but left without disputing his title. On the 15th of June, 1832, Wooland sold the negro to Booker Nevils, who, on the 30th of the same month, sold him to John D. Love, to whom he made an absolute bill of sale. The negro remained in Love's possession till the 18th of February, 1837, when Wood filed his bill in the chancery court at Columbia against Jones, Wooland and Love to redeem. They answered and depositions were taken on behalf of the defendants to show that Wood was aware of the sale to Wooland and of his adverse claim to the negro as early as 1830, without pretending to dispute his title. No proof was taken on

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behalf of the complainant; and the case presented the naked question—Whether, under the circumstances, the equity of redemption was barred?

On the hearing before Chancellor BRAMLITT on the 20th of September, 1838, his Honor was of opinion in the affirmative, and decreed accordingly. The complainant appealed in error.

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PILLOW for the complainant said, the main question in this cause is, whether complainant's right of redemption is barred by the act of limitations? In the case of *Overton vs. Bigelow*, 3 Yerg. 613—see 10 Yerg. 580—I understand this court to have expressly determined that the act of limitations will not bar the mortgagor's equity of redemption in this court. Viewing this decision as directly in point, it is conclusive against the decree so far as Jones is concerned.

We will now examine the case as it affects the rights of Wooland and Love. The mortgage being registered, was notice to them. 1 Johnson's Chancery Reports, 288, 398; Fonbl. Equity, 449, note. Wooland, in his answer, says Jones told him of the existence of the instrument or mortgage. This notice of complainant's equity of redemption arrested all further proceedings by the purchaser, and the whole purchase was in fraud of the equitable incumbrance. 1 John. Ch. Rep. 301; 3 P. Williams, 306. Notice of the trust makes the purchaser a trustee, notwithstanding the consideration paid. 1 Johns. Ch. Rep. 575; 1 Murphy, 219.

I am aware of this court having determined that all implied trusts are subject to the operation of the act of limitations; but where there is an express trust created by contract, and the trustee, in fraud of the rights of the *cestui que trust*, has attempted to denude himself of the trust by selling to a person fixed with the fraud by constructive notice and notice in fact, I am not of opinion that that decision could properly be applied to such a case. Notice being fixed upon the purchaser from a trustee by express contract, the law constitutes him a trustee in the room and stead of the first trustee, holds him subject to the same duties and responsibilities, and same law, and upon the ground that his purchase is in fraud of the equitable incumbrance, of which he had notice. If

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trusts of this kind are classed with implied trusts generally, and are liable to the bar created by the act of limitations, the trustee by express contract, can sell the trust property to persons having full notice of the trust (and thereby affected with fraud) and from the moment of sale, the statute will commence its bar, and thus by bad faith and fraud an estate clothed with an express trust be wholly swept from under the *cestui que trust*. Surely such cannot be the law. There ought to be, there must be a distinction between the rules of law applicable to estates clothed with express trusts, and by fraud attempted to be barred, and trusts created by implication of law merely, where lapse of time in the absence of fraud is relied upon as constituting a bar. An executor, guardian or express trustee can, if there be no such distinction in law, by selling the trust property, discharge the property of the trust altogether, and fix the trust upon himself personally, and thus completely change the nature of the estate, so as to convert a trust security fund into personal security, and this too by an act of fraud. Such will be the inevitable consequence of adopting the rule of law which bars such trusts as are created by implication of law, and applying it to cases of express trust created by contract, and attempted by a fraudulent sale to be defeated.

Such a rule of law would be no less revolting to equity and justice than ruinous to the community and policy of the law. In this case there was an express trust between Wood and Jones, created by contract. The character and nature of the trust cannot be changed by any act of Jones. It cannot by his act from an express trust be converted into an implied trust. That such is and must be the law so far as Jones is concerned, there can be no question. Can the transfer to Wooland and Love, (who were affected with fraud) affect the character of the trust. The law, by the contract of the parties, saddles the property with the trust. The express trust is affixed to the property, and when the property changes hands the trust follows the property and attaches in the hands of the second holder, who is by law converted at once into a trustee. It is not a case of trust by implication of law. The law does not raise the trust. The trust is clearly express, but

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the purchaser with notice is converted into a trustee with an express trust property, and is estopped by fraud from taking advantage of his own wrong, &c.

Cook for the defendant took the same positions, and relied upon the same authorities as he had done in his argument in *Yarborough vs. Newel*, reported in 10 Yerger, 376.

GREEN, J., delivered the opinion of the court.

January 30.

This bill is brought to redeem a negro man slave, mortgaged by the complainant to the defendant, Jones, the 10th of October, 1825, to secure the payment of the sum of four hundred dollars.

Jones sold the negro to Wooland in January, 1830, who in 1832 sold him to Neville, by whom he was, in June, 1832, sold to the defendant, Love. All the defendants, who have successively purchased and had possession of the negro, have claimed an absolute right to him, and have held possession for themselves respectively and adversely to all other persons.

More than three years having elapsed from the time Jones sold the negro to Wooland in 1830, before the bill was filed in 1837, the statute of limitations is a bar to the relief the bill seeks against Wooland and Love, and confers upon Love, who is now in possession of the negro, a perfect title. These persons, although they may have known of the complainant's equity, and thereby may have been by operation of law, trustees for him, may nevertheless avail themselves of the benefit of the statute of limitations; for nothing is better settled than that the statute runs in favor of a party, who is created a trustee by implication of law.

There is no contract between Wooland and Love and the complainant, and it is because the law will not permit them to acquire a title to the negro by purchase from Jones, with a knowledge of the complainant's equity of redemption, that it holds them liable as trustees. Although, therefore, they could not set up their title, acquired by purchase from the mortgagee, in bar of the equity of redemption, because it would be a fraud upon the complainant to permit them to do so, yet as they in fact have held possession adversely and for themselves, and not in subordination to, or consistently with the complain-

ant's right, the statute of limitations has operated in their favor and perfected their title.

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But the statute of limitations does not run in favor of the mortgagee, as this court has often decided. *Overton vs. Bigelow*, 3 Yer. Rep. 513; *Hammond vs. Hopkins*, 3 Yer. Rep. 525; *Yarborough vs. Newel*, 10 Yer. Rep. 776. 3

In the last case the court decided, that the mere possession of the mortgaged property by the mortgagee, for any length of time, short of that which affords a presumption of right, will not authorize him to plead the statute of limitations; but as all the members of the court were not satisfied that possession of the mortgaged property by the mortgagee, accompanied with an open declaration, known to the mortgagor, that the right of redemption was resisted, would not operate a bar to that right, within the time fixed by the statute of limitations, that question was left undetermined. But now, upon a reconsideration of the question, we are all of opinion, that even in this latter case, the equity of redemption would not be barred.

The relation of mortgagor and mortgagee stands upon grounds peculiar to itself. It is not the case of an ordinary express trust, nor to be governed by the same rules. The mortgagee has a right to the possession of the property. He holds it for himself from the first, and not for the mortgagor. The mortgagor's right to redeem, does not depend upon the mortgagee's possession. He may file his bill to redeem, as well if he have possession of the property himself, as if the mortgagee possess it. If therefore the mortgagee's denial of the right of redemption, he being in possession, would enable him to plead the statute of limitations, if a bill were not filed in three year's afterward, the same consequence would follow, if, while the mortgagor should retain possession, the mortgagee, were to declare he should not redeem. But for such an absurdity, no one would contend; and yet, we think the doctrine insisted on would lead to this result.

Again, if the mortgagee's possession of the mortgaged slave for three years would bar the equity of redemption, he might sue the mortgagor at law and recover the money he had advanced upon the mortgage; and thus, by virtue of the contract, he would undoubtedly have a right to the money,

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and by virtue of the statute of limitations, a right to the negro. Nor would the mortgagor have any better ground to enjoin a recovery of the money, by alledging, that his negro had become the property of the mortgagee by the statute of limitation, than a party who may be sued upon a bond, would have to enjoin it, by alledging, that he had an account against the plaintiff, which though just had been barred by the statute.

- We therefore think, that no length of possession, short of that which affords a presumption of right, will bar the equity of redemption.

The decree must be reversed, and a decree rendered for the complainant against Jones. The negro will be delivered up in two months, or in default thereof, the complainant will be entitled to his value, estimating it at the time the decree is pronounced, together with a reasonable allowance for hire, deducting the \$400 and interest.

NOTE. As to the general doctrine of the limitation of equitable demands, see the opinion of Sir William Grant in *Cholmondeley vs. Clinton*, the 3d point, 2 Merivale, 357; and the opinions of Sir Thomas Plumer, in the same case, 2 Jac. & Walk. 141, 157. On the latter page, he says—"Whenever a bar has been fixed by the statute to the legal remedy in a court of law, the remedy in a court of equity has, in the analogous cases, been confined to the same period." In *Bond vs. Hopkins*, 1 Sch. & Lef. 412, Ld. Redesdale says, p. 429,—"If the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon to prevent the bar created by the statute, the court, acting by analogy to the statute will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law he shall be bound in equity; but that is all the operation this statute has or ought to have on proceedings in equity." Lewin on Trusts and Trustees, c. 28.

2. As to the limitation of direct trusts, see Angell on limitations, 136 and cases referred to; Lewin on Trusts and Trustees, c. 28, and authorities cited.

3. As to the application of the statute of limitations to equities of redemption as between the mortgagor and a purchaser from the mortgagee with notice, see *Piatt vs. Fattier*, 9 Peter, 405. The facts are clearly and briefly stated by Judge Story, p. 413.

4. As to the effect of lapse of time on equities of redemption, see 2 Merivale, 357, *et seq.*

BENSON *vs.* PORTER.

CHANCERY. The Chancery court has jurisdiction to render judgment on motion against a sheriff for failing to return an execution under act of 1803, c 18, § 1. Construction of statutes upon that subject. 1787, c 2, § 2; 1809, c 49; 1811 c 72, § 4; 1813, c 78, § 3; 1827, c 79, § 2, 3; 1835, c 19, § 6,—c 3, § 2,—c 4, § 4, 13,—c 6.

The record in this case consisted alone of the following entry upon the minutes of the chancery court at Columbia, at September term, 1837.

“SEPTEMBER 22d, 1837. *Sylvanus E. Benson, Samuel Hunt, and John Patterson vs. Nimrod Porter.*

The execution docket of this court having been produced in open court, by the clerk of this court, and it appearing to the court from the entry of the clerk made on said docket as follows, to wit: “Execution issued May the 15th, 1837, to Maury county, and delivered to N. Porter, sheriff.” And from the testimony of the clerk and master of this court, who was qualified as a witness in this cause, *said entry appearing* to be in his hand-writing; and that on the 15th day of May, 1837, he, the said clerk and master, issued a writ of *feri facias*, on a decree of this court, entered upon the 7th day of April, 1837, for the sum of two hundred and sixty-four dollars and twenty-five cents debt, and the sum of twenty dollars interest thereon, from the rendition of the judgment at law to the entering up of said decree; and the further sum of seven dollars and nine and one half cents, costs of the suit at law, in the case in which Richard G. Looney is complainant, and Sylvanus E. Benson, Samuel Hunt, and John Patterson are defendants; and delivered the same to Nimrod Porter, Sheriff of Maury county, on the 15th day of May, 1837, to be executed.

And it further appearing to the court, from the testimony of the clerk and master of said court, that said Nimrod Porter, sheriff, has not returned said writ of *feri facias* to the present term of this court, to which it was returnable, as by law he was bound to do, and no return thereof being made yet, and this being the fifth day of the term, and the last day thereof.

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It is therefore on motion of said complainants adjudged, and decreed by the court, that the complainants recover of said Nimrod Porter, the said sum of two hundred and eighty four dollars, and twenty-five cents, the amount of the decree aforesaid, together with the further sum of seven dollars and nine and one-half cents, costs of the suit at law, embraced in said decree; whereupon, upon motion of said complainants, it is further considered by the court, that complainants recover of said Nimrod Porter, the further sum of thirty-five dollars and fifty-three cents, damages thereon, at the rate of twelve and one-half *per cent.* on the amount of the principal amount of said decree, so recovered as aforesaid, and that execution issue for the same as at law, to the Coronor of Maury county.

Whereupon the defendant prays an appeal in the nature of a writ of error to the next term of the supreme court of errors and appeals."

No counsel appeared for the plaintiff in error.

PILLOW, for the defendant in error, submitted the case to the court.

R. C. FOSTER, Special Judge, delivered the opinion of the court.

Upon the 22d day of September, 1837, being the last day of the term of the chancery court, at Columbia, Benson, Hunt & Patterson recovered a judgment on motion against the plaintiff in error, Porter, sheriff of Maury county, for the money and costs of suit mentioned in an execution, which issued from the March Term, 1837, of said chancery court, in favor of the defendants in error, Benson, Hunt & Co., against Looney, upon a final decree, rendered in the chancery court, which execution came into the hands of the said Porter, sheriff, upon 15th May, 1837, but was not returned as directed by the act of 1803, c 18, § 1.

From the judgment so rendered, Porter prosecuted an appeal in the nature of a writ of error, to this court, and the question made in argument, and submitted for the decision of this court, is, had the chancellor power and jurisdiction to render such judgment?

By the second section of the act of 1787, c 22, in all cases where decrees may have been made in equity in any of the courts in this state, or may thereafter be made, the writ of execution against the body, as well as the property of the defendant is given in the same manner, as in the courts of law.

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Upon the decree rendered by the chancellor at the March Term, 1837, in favor of said Benson, Hunt & Co. against Looney, the execution was lawfully issued, and when placed in the hands of the sheriff, subjected him to the same duties and responsibilities, as if issued from a court of law. By the act of 1803, c 18, § 1, if any sheriff shall fail to make return of any execution that shall come to his hands, issuing from the clerk of the county or clerk of the district court on or before the second day of the term, to which said execution is made returnable, judgment may be rendered against such sheriff for the amount of money and cost of said execution.

At the passage of the acts of 1787 and 1803, the judges of the then superior court possessed and exercised, in the character of judges and chancellors, all legal and equitable jurisdiction, not conferred upon the county court; the state being divided into three judicial districts in which the courts were held. If, after the passage of the act of 1803, an execution had been issued upon a final decree rendered, by a judge of that court, whilst sitting as chancellor, and placed in the hands of the sheriff, and he failed to return it as by the law directed,—that the sheriff would be liable to judgment in such case, under the act of 1803, none will controvert. But the question recurs, what tribunal would have had the power to render such judgment? We answer, the chancellor, who rendered the decree, and none other; because, by the words of the acts, the execution is made returnable to the term of the court, that rendered the decree, or gave the judgment, from which it issued; and of consequence the court, whether in the character of chancellor or judge, that rendered the decree, or gave the judgment alone, under the act of 1803, could pronounce judgment against the sheriff for such failure.

If, at the passage of the act of 1803, the present chan-

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cery system had obtained, and the exercise of legal and equitable jurisdiction had been vested then, as now, in different courts, and the court possessing chancery power had given a decree, from which an execution had been issued, and placed in the hands of the sheriff, and which he failed to return, could the complainant in such execution have applied to a judge of common law jurisdiction at a term of his court for a judgment? Certainly not.

By the act of 1809, c 49, the superior court was abolished, and the circuit court system established, with a court of errors and appeals, possessing appellate or other jurisdiction, specified by the act. And by the fourth section of the same act, the circuit judges, in their respective circuits, were invested with original jurisdiction over all matters and causes at common law, or in equity, whereof the superior courts of law and equity then had jurisdiction.

The power to render such a judgment, being at the passage of the act of 1809, vested in the superior courts, was by the passage of that act, *ex vi terminorum*, transferred to the judges of the circuit court, whether presiding as chancellors, or as judges of the common law courts.

By the act of 1811, c 72, § 4, the jurisdiction of causes in equity was taken from the circuit courts, and vested exclusively in the court of errors and appeals; and by the seventh section of said act, the court of errors and appeals in exercising such jurisdiction were to be governed by the same rules and regulations and restrictions by which the circuit courts were then governed, and were vested with the same power and authority that the circuit courts then had. The chancery jurisdiction which, by the act of 1811, had been taken from the circuit courts, and vested exclusively in the court of appeals, was, by the act of 1813, c 78, § 3, restored to the circuit courts, which courts from that time until 1827, exercised with the courts of appeal, concurrent chancery jurisdiction with the powers, originally given to the supreme courts.

In 1827, the chancery jurisdiction was taken from the court of appeals, and vested in a distinct and separate chancery court, with all the jurisdiction and authority, that attached to the exercise of such power in the previously existing

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and differently denominated courts; and in which jurisdiction was contained, the authority to render the judgment in the record set forth, and which still continues, unless taken away by the act of 1835, c 19, § 6. The caption of that act, is in these words, "an act supplemental to an act, entitled an act to establish circuit courts, passed at the present session of the general assembly." And the sixth section of said act, provides in substance, so far as it affects the question now under consideration, "that if any officer shall fail to make due and proper return of any execution issued from any court of record in this state, such officer shall be liable to judgment on motion in the circuit court of the county from which the execution issued.

Now does this section of the act of 1835 extend to executions issued from the chancery court, and take from it the jurisdiction to render judgment upon failure of the officer, and transfer that jurisdiction to the circuit court of the county in which the chancery court is held? For if it does, then also, by the same section, is the like jurisdiction taken from this court. That the legislature did not intend to include executions issued from this court, and the chancery court in the sixth section of the act of 1835, c 19, we think apparent. Because, previous to the passage of that act, by the second section of chapter 3, of the act of 1835, the supreme court is invested with such appellate and other jurisdiction, as had been by law, previously conferred on that court; and by the fourth and thirteenth sections of the act 1835, c 4, the chancellors were vested with all the powers, privileges, and jurisdiction, in all respects, which they then had by the existing laws.

That these respective courts had the power previous to the passage of the above act to render judgment in cases like the one under consideration is well established; and that the legislature at the enactment of these laws, well knew that the supreme and chancery courts, not only possessed, but had frequently exercised such power, we are bound to believe; because, previous to the act of 1835, c 19, the legislature, by the act of 1835, c 6, had abolished the county courts, so far as to hear and determine any pleas, real, personal or mixed,

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or any causes civil or criminal, wherein a jury trial might be demanded, leaving them the power still to issue executions from judgments or decrees remaining unsatisfied without the authority to give judgments upon the failure to return such executions; and therefore, when the legislature, in the sixth section of the act of 1835, c 19, use the words, "any execution issuing from any court of record," for a failure to return which, the officer is liable to judgment on motion, in the circuit court of the county, from which the execution issued, we must consider them as referring only to executions issuing from the circuit and county courts.

But if this were not so, still the sixth section of the act of 1835, c 19, does not take from the chancery court the jurisdiction, because the act of 1835, c 4, § 4, 15, giving such jurisdiction to the chancellor is not repealed by the act of 1835, c 19, § 6.

Let the judgment be affirmed.

ROSS vs. BLAIR.

WITNESS. *Competency—practice—released surety for prosecution competent.* Plaintiff's surety for the prosecution of his suit may be released, and examined as a witness in the cause. So a guardian, who commences an action of ejectment in the name of his wards, and gives his bonds for the prosecution of it, may be released when they come of age, and examined as a witness. *Ante Craighead vs. The Bank.*

SAME. *Same. Release of dower by second husband makes him competent.* If husband and wife join in a conveyance, releasing her dower in the land of her first husband to his heir, the second husband is a competent witness for the heir of the first husband, or the heirs of such heir, though they be the children of such second husband, in an ejectment brought by them to recover the land.

DOWER. *Release of, to heirs out of possession, whether champertous.* If a widow, to whom dower has not been assigned, release her right to the heirs not in possession, such release seems not within the purview of the champerty act; for it does not invest the heirs with the right of entry, and can, perhaps, operate only by way of estoppel.

SAME. *Whether acknowledging such release after champerty act is champertous?* If such release was not duly acknowledged to pass the wife's interest before the champerty act, her acknowledgment after its passage is not champertous, unless the transaction was so in its inception.

GUARDIAN AND WARD. *Appointment of Guardian.* The omission to state the names of wards in the record of the appointment of the guardian, if a defect, is remedied by the recital of their names in the guardian's bond, entered of record immediately after the entry of the order of appointment.

SAME. *Leases of ward's land—omission of covenant against waste.* The omission of a covenant against waste in a guardian's lease, though the covenant be required by the statute of 1762, c 5, § 13, does not vitiate the lease, or absolve the tenants from the duties and liabilities of the relation.

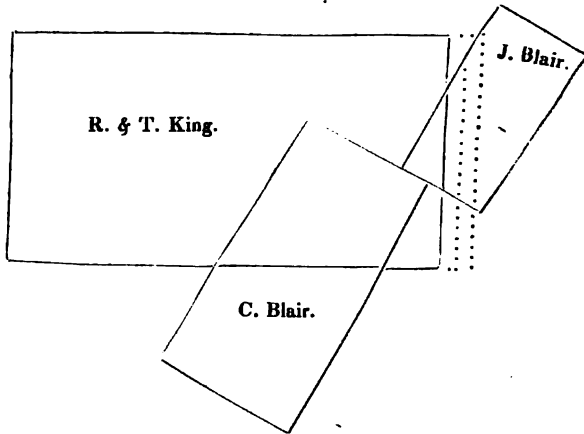
LANDLORD AND TENANT. *When tenant's possession becomes adverse.* To break the continuity of a landlord's possession held by tenant, and arrest the operation of the statute of limitations founded on such possession, the possession of his tenants must have become adverse to him; and their possession becomes adverse, from the time their attornment to another landlord is known to the first.

On the 10th of July, 1788, the state of North Carolina, by patent, No. 71, granted to Robert and Thomas King, 2500 acres of land, "at a place known by the name of *The Banks*, on both sides of the path that leads from the mouth of Holston to the ford of Wolf river."

There was also granted by patent, No. 484, dated July 29, 1793, to John Blair, a tract of 500 acres, on the main fork of Wolf river; and to Catherine Blair, by patent, No. 160, dated December 26, 1793, a tract of 1000 acres, also on the main fork of Wolf river.

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These tracts interfered with each other in the manner represented in the annexed diagram. The eastern boundary of the tract granted to Ross having been surveyed three times, is here represented, first by a back line, secondly by a dotted line, thirty-four poles east of the black one, and by another dotted line, twenty-seven poles east of the first dotted one.



On the 25th March, 1793, the Kings conveyed their tract to David Ross, of Virginia. In May of the same year John Blair died, leaving a widow, Sarah, and daughter, Catharine, the grantee of the 1000 acres, about two years old, and a son John, about twelve months old. Sarah Blair, the widow, was appointed guardian of her children, Catharine and John, by the county court of Grainger, on the 12th of December, 1797, and in the same month she intermarried with Joseph Cobb, and they had issue, Pharoah B., Frederick B., Elizabeth, afterwards married to Win. L. Atkinson, Mary, afterwards married to James Shields, Sarah, afterwards married to William Murray and Bersheba.

The order of Grainger county court, appointing Sarah Blair guardian, was in these words—"Sarah Blair, widow of John Blair, appointed guardian to the orphans of John Blair, deceased, and gave bond and security as the law directs, which bond is in the following words and figures; to

wit." The bond recited the names of the wards, but they were omitted in the order of appointment as appears above.

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In 1806, Joseph Cobb went to the lands granted as above mentioned to Catharine Blair and John Blair, and built a cabin on the 1000 acre tract, up to the eves logs and a small stable, and left them untenanted. In 1808, Catharine Blair, the grantee of that tract died. In June, 1809, Cobb again visited the lands, and rented the 1000 acre tract to James Watts, who was put in possession of the cabins Cobb had built; and to Samuel Sutherland the 500 acre tract. These leases were for seven years, and the tenants were to pay the taxes. But the leases seem not to have contained any covenant against waste as is required in leases granted by guardians of their wards' lands by the act of 1762, c 5, § 13.

The lease to Watts passed successively, it seems by assignments, into the hands of Chidick, Dale, and Crockett; in the possession of the last of whom it was, when John Blair came of age in 1814. In that year, and probably after his attornment to Ross, hereafter mentioned, Crockett applied to Blair at his residence, to renew the lease; and in 1815, Blair went in person to the land, and returned with a horse obtained from Crockett for the rent of it.

In the spring of 1815, Isaac Davis visited the tract granted to the Kings, in the capacity of agent of Ross; and finding those who held under the leases made by Cobb in possession of the land, covered by the grant to the Kings, within the interference, he persuaded some of them at least, if not all, to attorn to Ross, by taking leases from him of the same premises.

On the 24th of April, 1817, David Ross made and published his last will and testament, so as to pass lands in Tennessee, in which, after some specific devises, he gave the residue of his estate, real and personal, to his four children, Elizabeth Myers, wife of John Myers, Amanda A. Duffield, Frederick A. Ross and David Ross; and appointed Frederick A. Ross, Jacob Myers, and Thomas T. Bouldin his executors. Bouldin alone acted, and proved the will on the 6th of May, 1817.

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On the 28th of October, 1817, he commenced an action of ejectment on a demise in his own name, as executor of David Ross, in the Federal court at Nashville, notice of which was served on Blair's tenants. At June Term, 1818, Blair was admitted to defend this action jointly with the tenants.

On the 8th of September, 1818, Joseph Cobb and Sarah Cobb joined in a deed to convey to John Blair, junior, her dower in the 500 acres, granted to John Blair, senior. They acknowledged the execution of this deed in Grainger county court, at February Term, 1821; and a certificate thereof was endorsed thereon, to the effect that they had there acknowledged said conveyance "to be their act in deed for the purposes therein mentioned, the said Sarah, wife of the said Joseph, being examined separate and apart from her husband, as the law directs." And the deed and probate were registered in Overton county on the 12th of March, 1822. Besides the above acknowledgment, there was also endorsed upon the deed an acknowledgment and privy examination, taken before the clerk of Grainger county court, in pursuance of the act of 1833, c 92; on the 5th of November, 1835, and the deed with all its endorsements was again registered in Fentress, on the 30th of December, 1836.

After his admission to defend, but in the same year, Blair died, and his estate descended to the Cobbs, his half-brothers and sisters. They were made defendants at June Term, 1820, jointly with Crockett, the tenant; and on the 25th of July, the same year, the cause was submitted to a jury. His Honor Judge McNairy charged the jury, that if they believed David Ross was a citizen of Virginia, and that the lessor of the plaintiff was also a citizen of Virginia, and that neither of them had been in the state of Tennessee, during the continuance of the adverse possession of the defendants previous to the bringing of the action, then they should find a verdict for the plaintiff; because *eight* and not *seven* years is the time allowed a plaintiff so circumstanced by law for commencing his action of ejectment. The jury found the defendants guilty, and the plaintiff had judgment, from which the defendants prayed a writ of error.

To join in this judgment Blair's heirs now, namely on the

6th of May, 1823, filed a bill in the Federal Court at Nashville, which was pending till the 18th of September, 1832, when it was dismissed for want of equity; and the injunction which had been granted, was dissolved.

In the mean time, namely, on the 26th of February, 1826, an action of ejectment was commenced in Fentress circuit court, at the instance of Joseph Cobb, against Ross' tenants. The declaration contained four counts;—the first stated a demise of the 1000 acres in the name of John Blair; the second, a demise of the same in the name of Catharine Blair; the third, a demise of the same in the name of Catharine and John Blair jointly; the fourth, a demise in the name of Mary, Nancy, Sally, Pharoah and Frederick Cobb, infants under twenty-one years of age, by their guardian Joseph Cobb. At September Term, 1827, Frederick A. Ross, in whom the legal title to the 2500 acres was now vested by a conveyance from the heirs of David Ross, made on the 10th of April, 1820, was admitted to defend instead of the tenants, upon whom notice of the action had been served. At March Term, 1828, all the demises, except the fourth, were stricken out; and at September Term, 1831, the fourth count was amended by striking out the name of Joseph Cobb, guardian, and inserting in lieu thereof, the names of Pharoah B. Cobb, William L. Atkinson, and his wife Elizabeth, James Shields and his wife Mary, Frederick Cobb, Sarah Cobb and Bersheba Cobb, as the proper persons to prosecute the suit; it appearing to the court that they were the heirs of Blair, and for whom, while minors, Joseph Cobb had prosecuted the suit; that they had all come of age, and desired to be made parties instead of said Joseph Cobb,—they giving security to prosecute the suit, and for accrued and accruing cost. At March Term, 1832, the action was tried and the plaintiffs had a verdict and judgment, from which the defendants prayed an appeal to the supreme court. But the appeal was not prosecuted, and the parties afterwards agreed of record that the cause should abide the decision of the suit now to be mentioned, and that the same judgment should be entered in it as might be in that.

On the 31st of January, 1833, this action of ejectment

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was commenced in Fentress circuit court, in which the demise was laid in the name of Pharoah B. Cobb, Frederick B. Cobb, Bersheba Cobb, William L. Atkinson and his wife Elizabeth, James Shields and his wife Mary, and William Murray and his wife Sarah, and was of both the 1000 and the 500 acres. Notice of the action was served on the tenants, and Frederick A. Ross was admitted to defend in their stead at February Term, 1833. At August Term following, the venue was changed to White county, where, at June Term, 1838, the action came on to be tried, before his Honor Judge CARUTHERS, and a jury of White.

On the trial the parties made title by producing the patents above noticed; and as the title of Ross was the oldest, the controversy was, whether the lessors of the plaintiff, and their ancestors had had seven years possession of the interference before the commencement of the suit.

To establish the affirmative, the plaintiffs introduced Joseph Cobb, and proposed to examine him as a witness. The defendant objected that he was incompetent from interest; and he produced the record of the ejectment, commenced by Cobb, in Fentress, in 1826, and insisted that as the demise in the fourth count was in his name, as guardian of his children, the heirs of John Blair, junior, and he had given security to prosecute the suit, he could not be examined. He also insisted that the deed of the 18th of September, 1818, purporting to convey Mrs. Cobb's dower in the 500 acres to John Blair was champertous, and inoperative, and that Cobb was incompetent on that account. His Honor, however, admitted him, and he proved what is above stated, as having been done by him towards leasing the premises, as guardian of John Blair, in 1809.

The defendant also insisted, that as the record of Grainger county did not give the names of the wards, the appointment of Mrs. Blair, afterwards Mrs. Cobb, as guardian of her children, Catharine and John Blair, was void; and consequently, that leases made by her, or under her authority, were not binding on the lessors, and did not create the relation of landlord and tenant. And he further insisted, that the leases

made by Cobb were void, because they contained no covenants against waste.

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The testimony was very voluminous, and much of it irrelevant. It clearly established that Blair's tenants were put in possession of the premises in 1809; that some of them, if not all, attorned to Ross, and took leases under him in 1815, and perhaps shortly afterwards took leases from Blair again; and upon this testimony the defendant lastly insisted, that the continuity of Blair's possession had been broken, by the attornment of his tenants to Ross, though Blair, the landlord, was ignorant of that attornment.

His Honor instructed the jury—1. That if Cobb leased the land as guardian in right of his wife, or as agent for her to tenants, who took possession and held under the leases for seven years continuously before the ejectment in the Federal court was commenced by Ross, then the title of the plaintiffs was made good by the statute.

2. That those who took possession under Watts stood in his place, although they might have been ignorant of Blair's title, and their possession was Blair's, unless they took as purchasers of an occupant right and held it absolutely independently of any existing title.

3. That the possession of those who held under Watts, or purchased his interest, could only extend to the boundaries of the improvement, if by their contract with him they only bought or leased to the extent of the improvement; and in that case, the Blair title could only be made good to the extent of the possession. But if by the terms of their contract, they took the interest which he had without any limitation as to boundary, their possession of part of the interference was possession of the whole.

4. If Crockett and Sutherland were in under Blair, and took under Ross, acting through his agent, Davis, before or after John Blair came of age, that did not of itself convert their possession into an adverse possession to Blair. It did not become adverse till Blair had notice of it, if it was after he came of age, or until he or his guardian one had notice of it, if before he came of age. And if as soon as it came to his knowledge, if it ever did so, or if before he had know-

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ledge of it, the tenants instead of holding out an adverse character, took leases of him, the continuity of his possession was not broken.

The jury found a verdict for the plaintiff; and the defendant's motion for a new trial being refused, he appealed in error.

JAMES CAMPBELL for the plaintiff in error said we insist
Dec. 6, 7, 8, 9. that the appointment of Sarah Blair guardian of the orphans of John Blair deceased, without designating them by name is void. It has been decided that a judgment against them without designating them by name is void. The principle of that decision is precisely in conformity with what is contended by the counsel for the plaintiff in error. To appoint a person guardian for heirs without designating them by name is void, because it is very often a matter of doubt and difficulty to ascertain who are the heirs. It is a subject matter of proof liable to be contested. The same difficulty will arise when the designation is by using the word orphans. Does this expression necessarily designate children is contradistinction from grand children, legitimate from illegitimate children? If then this appointment of Sarah Blair guardian of the orphans of John Blair be void, the tenants under John Blair, agreeably to the opinion in 9 Yer. 463, were not estopped from taking protection under Ross's title in 1815.

2. But supposing the leases made by Joseph Cobb agent of his wife in 1809 were valid leases made by the authority of the guardian, yet the leases taken by the tenants of Blair, under Davis as the agent of Ross in 1815, broke the continuity of Blair's possession. It cannot be pretended that Blair had seven years *continued* possession of the land, when his tenants in 1815 or before the expiration of seven years attorned to Ross, or took leases under him. A tenant may by his own act convert his possession into a possession adverse to his landlord; *Willison vs. Watkins*, 3 Peters 44; *Bradstreet vs. Huntingdon*, 5 Peters 438; 2 Sch. & Lef. 624.

It is no answer to this proposition to say a tenant is under an estoppel to dispute the title of his landlord. A tenant may be under an estoppel and yet his possession be adverse to that of his landlord. It is agreed on all hands, and the cases

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cited fully prove, that if a tenant disclaims holding under the title of his landlord, or attorns to another, or purchases in an outstanding title, and gives notice to his landlord of such disclaimer, attornment or purchase,—of his intention to hold for himself—his possession from that moment becomes adverse to his landlord; and if the landlord, after such notice permit the tenant to remain on the land for seven years, the tenant's title is perfected by the statute of limitations, and the landlord is forever barred. But supposing that the landlord in the case stated, does bring suit for the recovery of the land within the seven years—what is the consequence? The tenant is placed under an estoppel. He cannot dispute the title of his landlord or set up his own. He must surrender the the possession even though he has the superior title.

A tenant in common who enters into possession of land, holds for himself and his co-tenant. The presumption of law is that his possession is not adverse to, but in conformity with the title of his co-tenant. His possession is of a fiduciary character, precisely like that of the possession of a tenant. So the cases in 3d & 5th Peters fully decide as well as the case in 5 Wheaton 417; 5 J. C. R. 388, and numerous other authorities. Yet a tenant in common can hold adversely to his co-tenant. If he does so, the statute of limitations will run in his favor from the time of his ousting his co-tenant, and setting up his adverse possession. 3 Dane's Abr. c. 92, Art. 1 and the cases there cited, *Jackson vs. Tibbits* 9 Cowen's Rep. 252.

3. It was decided by this court, when this cause was before them at a previous term, that a tenant is under no estoppel to take a lease from another person than the one he holds under, when there is no mutuality of obligation. If the landlord be an infant or is under no obligation to keep the tenant in possession, the tenant is under no obligation to uphold the landlord's title and hold under it. Joseph Cobb, supposing he acted as agent of the guardian, had no authority to make the leases mentioned in this record. In England a guardian in socage has a real interest in the land during the minority of the infant. Comyn's Dig. 381.

He can make his leases and bring suits for the lands

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of his ward in his own name. He is entitled as a matter of right to the possession of his ward's land during his minority. Hence he may make a lease of the land of his ward during his minority. In this State we have no guardians in socage. Guardians are appointed here under the authority of our act of 1762, ch. 5. The guardian here is appointed by the county court, and is removeable whenever the interest of the ward shall require it to be done. He has no interest in the land. Whenever he is removed and a new guardian appointed, the successor is entitled to the possession of the lands of his ward precisely as his predecessor had it. The powers of the guardian are conferred altogether by the act of 1762, ch. 5, sections 3, 11, 12, & 13. He has no other powers. Does this act give the power to a guardian to make leases, such as are here described to have been made by Cobb. Leases extending beyond the period when the ward would arrive of age, containing no provision against waste,—no reservation of rent, and imposing no obligation whatever upon the tenant except to pay the taxes? If then this contract made by the agent was without authority it is void. It imposed no obligation whatever upon the ward to uphold the tenant in his possession, and as there was no obligation incurred on the part of the landlord to the tenants—the tenants were under no estoppel to take leases and hold under Ross in 1815.

Cook on the same side, said, the title of defendant being the oldest and best, the question is, has that title been barred by the statute of limitations?

Take the testimony in the strongest point of view against Ross and allow Cobb to be a competent witness; and then the proof shows that Blair's possession commenced in June 1809 when Cobb gave James Watts a lease on the 1000 acre tract and Southerland a lease on the 500 acre tract for seven years.

Supposing for the present this possession was continued, yet it appears that in the spring, March or April 1815 or 1816, Davis as the agent of Ross went upon the land and threatened to turn the tenants out, and they then took written leases under Ross's title.

These tenants then held for Ross until some time in the

summer following, when they again took leases under Blair's title.

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Now the first question is, did the taking of leases under Ross's title by Blair's tenants and the holding under Ross for a time, break the continuity of the possession?

What did the transaction between Davis and Blair's tenants amount to?

It amounted to a disseizin. This will at once appear when we consider the nature of seizin and disseizin at common law.

Before the use of letters all property in land passed by a solemn act of investiture. This was by an entry on the land and delivery of a twig or turf for the land.

A disseizin was the entering upon and ouster of the tenant by a wrong doer and usurping his relation. This always implied a wrong, and always supposed the title in the tenant in possession; otherwise it would only amount to a dispossession or ejectment. *Taylor vs. Horde*, 1 Burr 107; Co. Lit. 153, § 233, and note; 181, § 279, and note; Plowd 89; Angell on Lim. 79; 2 Bac. Ab. 482; 5 Peters, 439, 440.

Now in this case Davis entered upon the land, executed leases to the tenants and they agreed to hold under Ross. This is precisely the kind of acts that constitute a livery of seizin or feoffment at common law, where there is no adverse possession; and is precisely the definition of a disseizin or dispossession, when the land was before tenanted.

But it may be argued that the tenants of Blair could not throw off their relation and hold adversely to Blair. It is true they could not rightfully constitute themselves tenants of Ross, and hold adversely to Blair; but it is not true that they could not in point of fact do so. If in fact they did so, then the transaction would amount either to a disseizin or dispossession. So far as to enable Blair to regain possession they would be his tenants. To show his title he would not be put to turn them out, nor could they show a better outstanding title in Ross or another. But because they could not rightfully do this it does not follow that they did not, in point of fact, hold adversely and for Ross. Adverse possession is always a question of intention, an operation of the mind connected with the possession, as forming the character thereof,

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and giving its true characteristic. If this were not so the landlord could never turn out his own tenant after the expiration of his lease, or where he denied the title of the landlord during the continuance of the lease.

If this adverse holding by the lessee against his landlord continues for seven years the title is barred.

If this be the case, of course the holding of the tenant cannot count for the landlord during the same time, and operate to make his title good by the statute of limitations.

If that were so, then one possession and one holding would at the same time ripen two adversary titles, the one by an actual holding under it, and the other by a constructive holding under it.

But if this holding could operate to ripen the original landlord's title, then it could never bar that title by any length of possession; but would always operate to confirm and make it better, thereby in effect defeating the title under which the tenant in fact held.

This view of the case shows, that a constructive tenancy cannot operate to confirm the title of the landlord, but there must be a holding under the title in point of fact. Adverse possession is always a question of fact, 9 Johns Rep. 163; 5 Peters Rep. 402, 438—9, 440.

If this be so, then the holding under Ross from the spring to the summer of 1816 broke the continuity of possession, and being within the seven years, there is no continued possession under Blair's title giving it preference over the older and better title of Ross.

But it may be said, that in the case of *Duke's Lessee vs. Harper*, 6 Yerger, it is decided that the adverse possession of the tenant does not operate against his landlord until that landlord is informed of its adversary character. It is true that such a decision was made, and if taken in a proper latitude, it was rightly decided. But it does not follow, because the possession could not operate to defeat his title before he knew of its adversary character, that in the mean time it should operate to ripen, and make better his title. This would be a perfect *non sequitur*. It would make the character of the holding depend on the landlord's knowledge

and not upon the *quo animo* with which the possession was in point of fact held. Could his knowing it make it adverse when it was not before? Would it be a holding for him while he was ignorant, and against him as soon as he was informed thereof? This is absurd.

The truth is that by the decision in *Duke vs. Harper* an equitable construction is given to the act of limitations on account of the apparent hardship of the case; namely that the statute shall only run from the discovery of the adversary holding and not from its inception.

The holding is certainly of the same character whether known to the landlord or not; that depends on the tenant, and not on the landlord.

But if it were not so, yet the landlord must have known of the adversary character of the holding of his tenants. The proof shows he did; and this knowledge would make the adversary holding commence running against him, and if it ran against him for an instant the continuity of the possession is broken. But Judge Caruthers has also ingrafted another equitable exception upon the statute, to the effect that seven years continued possession shall not be required, but he shall be allowed such additional time as may be necessary to counteract the wrongful or negligent acts of the tenants.

Suppose the tenants had gone from the land and left it unoccupied, would the time still run on until the landlord knew of it? He might not know of it for years.

Suppose instead of holding under Davis they had given up the possession to him as Ross's agent. Would the possession of Ross by his own agent operate to perfect the title of Blair. That will surely not be pretended. Yet it is precisely this case in principle. 9 Johnson, 163; 5 Wheaton 439, 440.

2. It is proven that John Blair was an infant when the leases were made by Cobb as his guardian. They are not made pursuant to the statute 1762 c. 5 § 13. There is no provision against waste &c. This renders the lease void and not obligatory on the infant; and not being obligatory on him, it is not on the tenants, and so they were not estopped to hold under Ross. Co. Litt. 352; Bac. Ab. 190; 9 Yerger,

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469, *Ross vs. Cobb*; Cro. Eliz. 36, 37; Shep. Touch 276; Rolls. Ab. 871; Cro. Eliz. 300.

3. The act requires the lease to be made only until the infant come of age. Of course it would be void for the excess; and being so void, the tenants were not estopped to take leases under Ross, after Blair came of age in 1814. 6 Wend. 666: 4 Com. Dig. 85; Co. Litt. 48.

4. The appointment of Sarah Blair widow of John Blair guardian of the orphan children of John Blair, without naming who they were is void; and so the leases made by Cobb were void. It is a judicial proceeding and must contain reasonable certainty upon its face. The names of the parties must be given otherwise there is no certainty upon the record.

In the year 1810, there was no tenant on the 1000 acre tract but Chidick; and he only leased the field and no more. After Chidick left there was not seven years before the action of ejectment in 1817. Therefore, in no event, can more than seven or eight acres be recovered.

6. The court erred in permitting Cobb to give evidence. He and wife were entitled to a dower right in the 500 acres at the commencement of this suit. And their subsequent conveyance thereof with a view of becoming a witness is champertous and contrary to the act of 1831, c. 66, § 3. The deed of the *former* before the privy examination was merely void; and when that took place, John Blair was dead and this suit was pending, and it appears from Cobbs deposition that the deed was made without consideration and merely for the purpose of becoming a witness. The deed then is champertous and contrary to the spirit of the act in question.

7. It is in proof that the original possession of the land was not taken under Blair's title. Nipp settled as an occupant on the 1000 acre tract in 1807, and improved it and sold his improvements, and possession to Watts, Watts sold to Raines, Raines to Dale, and Dale to Crockett.

Sutherland settled as an occupant in 1809, and in the summer of that year agreed to hold under Blair, and in the spring of 1815 or 1816 agreed to hold under Ross, and in that fall again agreed to hold under Blair.

Where the original possession is not acquired from the

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landlord, the tenants are not estopped to claim under another title. The rule only applies where the original possession was obtained from the landlord. In that case, he is bound to place the landlord in the situation he was before by restoring him his possession. When Crockett and Southerland disclaimed to hold under Blair he was then placed in a *statu quo*. The tenants had nothing that they had acquired of him, but both parties stood precisely as they did before. 12 Wendell 105, *Jackson vs. Leek*; *Jackson vs. Spear*, 7 Wendell 401; 2 Johnson's cases 353, *Jackson vs. Curdon*.

LAUGHLIN and A. CULLOM for the defendants in error. All questions of boundary, and that the plaintiffs in error, the defendants below, were in possession of the land in dispute when suit was brought, and that the present suit was brought immediately after the determination of the suits in the Federal court, being admitted, it may be most convenient to consider the questions now made in the cause in the order of time in which they arise. February 8, 9.

1. The legality of Sarah Blair's appointment as guardian of John and Catherine Blair, the minor children of herself and her deceased husband, is questioned. The appointment was made by the proper court, in the proper county, and in conformity with the act of 1762, c. 5, § 5. The order of appointment and bond constitute but one record; and it is sufficiently certain on its face. In examining its validity, established rules of construction must be resorted to. A fundamental rule in the interpretation of all instruments, laws and records is, to construe them according to the sense of the times, terms, and intentions of the makers. Story's Com. on Const. Ab, § 381; 3 Hay. Rep. 10, 58. The maxim, *mala grammatica non viliat*, that neither false English nor bad Latin will destroy an instrument, is applicable to this record. 2 Bl. Com. 379. The bond is regular, as well as the appointment, though the manner of taking the bond has been changed by act of 1825, c. 45, § 1. By act of 1762, c. 5, guardians had express authority to lease lands and receive profits.

The leases made by Davis, as pretended agent of David Ross, in 1816, and taken by Crockett and Sutherland, do not

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amount to a disseizin or ouster of Blair's possession. The holding under the Blairs was under a special contract of lease, and the tenants could not attorn or disclaim the title, so as to operate as an ouster of Blair's possession. Their possession, in law and in fact, continued to be Blair's, until the expiration of the term. They were estopped from doing so. *Duke vs. Harper*, 6 Yerg. 280, 285; 5 Tenn. Rep. 4; 5 Yerg. 379; Wheat. 535; 3 Peters, 47; 4 Hay. 158. The doctrine of estoppels, which are mutual, operates upon the case. Adams on Ej. 276; 4 Com. Dig. A. 2; Angell on Lim. 105, 106. 107, 108.

3. The possession of Blair from the spring of 1816, when it is pretended Sutherland and Crockett (Crockett holding under Watt's lease,) took leases from Davis until the time, in the month of June in that year, when the seven years possession under Cobb's lease, as acquiesced in and confirmed by John Blair after he came of age in 1814, was not a constructive possession, but an actual possession, and holding under Blair, and for Blair; from which Blair was not and could not be ousted by the acts of Davis and the tenants, of which he had no notice. Ross never considered that he had obtained possession by Davis' lease, nor did Crockett or Sutherland; and hence Ross commenced ejectment in the Federal Court in 1817, against Crockett, Sutherland, &c. as Blair's tenants.

4. Even if Blair had not confirmed Cobb's lease, and had barely acquiesced, the relation of landlord and tenant would have existed, as they were in under his title, and they would have held for him at will, or from year to year, and their possession would be his. 2 Caine's Rep. 169; 1 John. Rep. 322; 4 Hay. Rep. 153; 5 Hay. Rep. 191; 13 John. Rep. 118, a.; 3 Johns. Rep. 223, 499.

5. The cases cited by Anderson, *erguendo*, 6 Yerg. 283, in the case of *Duke vs. Harper*, in this court, prove that Crockett (holding under Watt's lease,) and Sutherland having entered into possession under the Blairs, thereby acknowledged their title, and can never be allowed to dispute it, or take under another, pending their lease, so as to defeat Blair's title and possession. The distinction taken by plaintiffs in error, that the tenants could not attorn from Blair *in law*, but that

they did so *in fact*, so as to operate as a dispossession or ouster of Blair, cannot be maintained by any authority. The position is a metaphysical refinement, and has no adjudication to support it.

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6. The leases made by Cobb, as guardian, having been confirmed by Blair on coming of age, and the possession commenced under the leases continued, the statute had perfected the title. The effect of Blair's acquiescence or ratification of the lease to Crockett, confirms the effect of the possession in his favor under the statute. 3 Gwillim's Bac. Ab. 414, 415, Tit. Guardian, G. If the lease had been voidable after the infant came of age, or for want of authority in Cobb as guardian, or had been made by Blair in his minority, yet if he accepted rent, or acquiesced, or confirmed the lease, after coming of age, it is made good for the whole term, and such ratification operates upon it *ab initio*. 3 Salk. 196; 1 Lil. Ab. 55, cited in 2 Tomlin's Law Dict. 182. The pretended lease of Davis was after John Blair came of age, and confirmed Cobb's leases.

7. There is believed to be a total absence of all proof of any authority in Davis as Ross's agent. There must be proof of agency, especially where he is empowered to give a lease, or transfer any interest in lands. 2 Kent's Com. 278. That the authority of agent must be shown and proved, by a party claiming benefit under his acts, is, however, conceived to have been settled by this court in the case of *Floyd vs. Woods* 4 Yerg. 165.

8. Joseph Cobb was a competent witness. On the trial, the defendants below examined him on his *voire dire*, and he disclaimed all interest. The record shows his discharge as a party to the suit, and the giving of other security for all the costs accrued and to accrue in the cause. The deed of Cobb and wife to Blair, conveying her dower interest in the lands in dispute, is not champertous. The deed was made and bears date 8th September, 1818, and was acknowledged by Cobb, legally as to him, on the 21st Feb. 1821. This suit was not commenced until 31st January, 1833; and the Act of Assembly of 1821, c. 66, was not passed until the 16th November, 1821. See Pamphlet Acts, p. 71. The deed was duly

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registered in Overton, where the land lay, and since in Fentress, where it now lies. The deed has been again acknowledged, certified and registered as to Mrs. Cobb. The deed had a legal, valid existence as a deed—and all acts done, after it was made, in confirmation of, and to give it effect, cannot be champertous, unless it was clearly so in its inception. 4 Kent's Com 441; *Jackson vs. Kitchum*, 3 Johns. Rep. 479. A deed from husband and wife, without the privy examination of the wife, though void or voidable as to her, is good for some purposes, and is such color of title as will protect the purchaser under the statute of limitations. *Ferguson et. al. vs. Kennedy*, Peck's Rep. 321. The deed in this case, however, totally divests Cobb of all interest. There is no pretence that Mrs. Cobb ever had dower in the 6000 acre tract, granted to Catherine Blair. The third section of the champerty act of 1821, cannot, by any proper construction, be made to apply to the situation of Joseph Cobb as a witness in this cause, for the reasons above stated; and because the provisions of this section do not relate to persons situated as Cobb is, who may offer to divest themselves of such contingent interest as he is supposed and presumed to have had in this cause. The deed is not a "pretext" within the meaning of the act—nor did he ever have a "joint interest" with the plaintiffs below, either within the letter or spirit of the act. The deed was not made to render Cobb competent as a witness. However this may be, the deed was made, and consummated by a legal acknowledgment by him, before the act was passed. John Blair, to whom the deed is made, died in 1818, we do not know in what month—and the deed was made, as is most clear, before his death, and is dated 8th September in that year. It must have the effect of passing any interest Cobb may have had to the heirs at law of John Blair, having that effect from its date, and the perfecting of the conveyance afterwards by acknowledgment or probate, and registration, it is only a consummation of the title.

If these leases count back to the time when the tenants actually settled on the land—and from the date from which they agreed to be Blair's tenants—then the seven years possession of Blair is fully ended before the time in 1816, when

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Davis gave his leases, pretending to act for Ross. If tenants entered by parol permission of Cobb, and he confirmed them as tenants, by recognizing them as such, for the portion of the year 1809 which had passed before execution of written leases, then Blair's title was perfected by the statute of limitations before Davis interfered. The leases might well be made to relate back to the time when the possession was actually and in fact taken by the tenants. In the trial below, these facts, upon evidence, were fairly and legitimately before the jury.

If there be no material error in the charge of the court below, there will be no ground for reversing the judgment and granting a new trial, because the verdict may seem to be against evidence, where the testimony is irreconcilable and contradictory, unless the finding of the jury is clearly and manifestly against the weight of evidence. 5 Mass. Rep. 353. Even if the Judge misdirects the jury, if justice has been done, a court will not grant a new trial. 4 Day's Rep. 42. The court will not reverse the judgment to grant a new trial where there has been evidence on both sides. 1 Caine's Rep. 24; 2 Johns. Rep. 271. To authorise a new trial, the verdict must be so clearly against weight of evidence, as to afford a well founded reason to believe that injustice has been done. 1 Caine's Rep. 162. A judgment will not be reversed to give a new trial for misdirection of the Judge, unless the misdirection went to the merits of the case, or clearly influenced the verdict. 2 Caine's Rep. 85. A verdict of a jury in this court will not be set aside, unless there exists a great preponderance of evidence against it, and unless the preponderance is so manifest as to present a case of great rashness on the part of the jury. *Grubb vs. McClatchy*, 3 Yer. Rep. 442; 4 Yerg. Rep. 149; *Perry vs. Smith and Mayfield*, 4 Yerg. Rep. 323; *Sellars vs. Davis*, 4 Yerg. Rep. 503; nor will a new trial be granted where there is strong proof on both sides. *Wilson vs. Nations*, 5 Yerg. Rep. 211. In this case there have been two concurring verdicts upon the same state of facts and testimony.

The policy of our courts, founded upon the long chain of precedents from 1715, down to the recent adjudications under

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Brown's quieting act of 1819, characterized throughout by the most wise caution, has been to preserve and establish titles acquired under the several statutes of limitations. In this case, however, the court is urged to depart from this policy by the plaintiffs in error, and to become astute in searching for reasons to defeat the operation of the statute upon the subtle grounds of pure modern technicality.

REESE, J. delivered the opinion of the court.

Several questions have been discussed in this case. We will notice some of them.

1. Was Joseph Cobb a competent witness? The plaintiff in error insists that he was not, upon two grounds: first, because this suit having been brought in his name as guardian, the circuit court, upon his wards arriving at their majority, substituted their names for that of Cobb, and took a new bond for the prosecution of the suit, and to secure the costs of the suit, as well those previously incurred, as those which might be incurred, and released Cobb from all liability.

The power to do this is denied, in the argument, to the circuit court, and it is said Cobb is still liable for the costs incurred while he was a party, and therefore an incompetent witness. This court has settled the question against the objection, and in favor of the power of the circuit court, in the case of *Craighead vs. The Bank*

But, secondly, it is said that Cobb was an incompetent witness, because his wife, the mother of the lessors of the plaintiffs, would be entitled to dower in the 500 acre tract of land granted to the elder Blair, her first husband, and because the deed from Cobb and his wife, to John Blair, the younger, dated in 1818, and set out in the record, was as to the acknowledgment and examination of the wife in February 1821, before the passage of the act of 1821, ch. 66, commonly called the champerty act, not valid and effectual; and her acknowledgment and examination since that act is affected and rendered void by its purview.

To this we answer, 1. That the acknowledgment by Cobb himself, in February, 1821, was a good and valid transfer and release of all his interest in the dower during

his life, and forever. 2. We think that the subsequent acknowledgment of the deed by the wife, being in confirmation of an existing instrument, and intended to give it effect, should not be held to be effected by champerty, unless the transaction was so in its inception. 4 Kent's Com. 441.

3. It may well be questioned whether, if a widow to whom dower has not been assigned, transfer, or release it to the heirs who are not in possession, the transaction comes within the purview, or violates the policy of the champerty act. For as we have said in the case of *Guthrie and Wife vs. Ows*, that the entire title before the assignment of dower, is in the heirs, as the title of the widow to dower is inherent in and involved with that of the heirs; if they are barred, she is barred—if they recover the possession, they recover in their own name and for themselves, and her transfer to them would give no more title or capacity to sue; such transfer, perhaps, before assignment, operating only by way of estoppel. We are, therefore, of opinion, that Cobb was a competent witness.

2. It is contended that Sarah Blair, since Sarah Cobb was not duly appointed the guardian of John and Catherine Blair; the record of appointment only stating that she was appointed guardian of the minor children. We are not prepared to say that this alone would not be sufficient. The guardian bond, however, states the names of her wards, and if there could be any doubt upon the other point, removes it.

3. It is said that the leases taken by Cobb are not in conformity with the statute which requires that the leases should stipulate against waste, and therefore that the lessors are not bound by them. We answer that these provisions of the statute are mandatory to the guardian, and their omission cannot absolve the tenant from the duties and liabilities of the relation into which he has entered.

4. It is strenuously, and with much ingenious argument, contended that the circuit court erred in charging, that to break the continuity of the possession under Blair, the possession of his tenants must have become adverse to him; and that to constitute such adverse possession, their attornment to Ross must have been known to their landlord, Blair.

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This principle is distinctly determined by the court in the case of *Duke vs. Harper*, 6 Yer. Rep.

It is the very point upon which that case turned. And the principle of *Duke vs. Harper*, is drawn from and maintained by the case of *Willison vs. Watkins*, 3 Peters, 43; and the case of *Peyton vs. Stith*, 5 Peters.

This court has repeatedly sanctioned the case of *Duke vs. Harper*, particularly in the case of *Lane vs. Osment*, 9 Yer. 86. And to contend that the continuity of the landlord's possession, with reference to the statute of limitations, is broken by acts of the tenant, which do not amount to an adverse possession, from which the statute will begin to run the other way, is to rest upon a distinction too attenuated for the safe and practical adjustment of the rights of parties in a court of justice.

We are not aware that such a distinction has ever, in any case, received judicial sanction.

Upon the whole, the judgment must be affirmed.*

* See 9 Yerger, 463, where this case as reported as of December Term, 1836. The record, as reported in that book, did not show that Mrs. Cobb had been appointed by court guardian of the children. It appeared that Cobb had made the leases as guardian by nature of the heirs of John Blair,

PARTLOW vs. ELLIOTT.

PRACTICE. *Non suit—nolle prosequi*—1801, c. 6, § 58. The terms non suit and *nolle prosequi* have long been confounded in Tennessee, and used as convertible. Since the act of 1801, c. 6, § 58, providing—"that every person desirous of suffering a non-suit on a trial at law, shall be barred therefrom, unless he do so before the jury retire from the bar"—the motion to take a *non-suit*, when made by a plaintiff, is equivalent to the motion to enter a *nolle prosequi*; and it is error to refuse the motion, though made after the evidence has been heard by the jury, and they have been charged by the court. Wherever at common law, the plaintiff could enter a *nolle prosequi*, he may, by our practice, under the act of 1801, enter a *non suit*. See Lee's Dictionary of Practice—*Nolle Prosequi*.

On the 27th of February, 1835, James Elliott executed to Jahn Ray, his *bill single* at thirteen months after date, for 1850 dollars,—and his *promissory note* at twelve months for 2000 dollars. These Ray assigned by endorsement to John A Partlow on the 2nd of March afterwards.

On the 20th of April, 1837, Partlow brought debt against Elliott in Wayne circuit court; and declared in one count upon the bill, and in a second upon the promissory note. To the first count Elliot pleaded *non assignavit*, and to the second, *nil debt*, and two special pleas to the effect, that the promissory note had been obtained by Ray, Partlow and others, by means of fraud and misrepresentation, and without consideration. And upon all of the pleas issues were joined.

On the trial at March Term, 1838, before his Honor Judge TOTTEN and a jury of Wayne, after all the evidence had been heard, and the Judge had charged the jury, and they were about to retire from the bar to consider of their verdict, the plaintiff, by his attorney, moved the court to enter a *non suit* as to the second count. But the court over-ruled the motion, and the plaintiff excepted to the opinion over-ruling it, and a bill of exceptions stating the facts was tendered and signed.

The jury found a verdict for the plaintiff upon the first count, and for the defendant on the second count. The plaintiff moved for a new trial, which the court refused, and gave judgment that he "recover of the defendant the debt and damages assessed by the jury," costs, &c. From which judgment the plaintiff appealed in error.

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January 28.

JAMES CAMPBELL for the plaintiff in error.

NICHOLSON, for the defendant in error, said—It is insisted for the plaintiff that he had a right to enter a non suit, and that the court below erred in refusing his motion.

Judgment of non suit can be entered only at the instance of a defendant, and the obvious reason is, that the plaintiff is always supposed to be absent when such judgment is entered. *Arnold vs. Johnson*, 1 Stra. 267; 1 Saund. R. 185 d. n. The manner of entering judgment of non suit shows clearly that in legal contemplation the plaintiff is absent: "Upon which the said A. being solemnly called, doth not come, nor further prosecute his bill against the said B.; therefore," &c. 2 Lilly, 508. It would be an absurdity to state upon the record that the plaintiff came into court and moved to have himself called, and upon his failing to come, that judgment of non suit was entered. Yet this was the absurdity presented by the motion of Partlow in the court below.

But, notwithstanding the rule that the motion for non suit must proceed from the defendant, yet it is admitted that the court cannot order a non suit to be entered against the consent of the plaintiff. 2 T. R. 281; If he be really absent, he is supposed to be voluntarily so; and if he be present, he is supposed to consent to the motion of the defendant to enter a non suit. Still a motion by a plaintiff to enter a non suit is wholly unknown in the practice of courts.

If it be true that a plaintiff cannot move for a judgment of non suit, it follows that he could not move for non suit, as to part and proceed to trial as to part.

But whether this position is true or not, it is insisted that a non suit to part is necessarily a non suit to all. Even if a defendant move for judgment of non suit as to part, and the plaintiff consent, it operates as a non suit to all. This consequence follows necessarily from the very nature of the non suit, and is laid down in so many words. 5 Bac. 145.

In a case in 3 Hawk, 228, the right of a plaintiff to enter a non suit is fully discussed. In that case the plaintiff had gone into court, and suffered a non suit to be entered, and the record so represented it. He then appealed to the supreme court, and the court there decided that a plaintiff cannot move

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for non suit, but as the record showed that the entry was made at the instance of the plaintiff, that they would construe it to be a *retrazit*, and upon that construction decide the case. A *retrazit* is an open abandonment of his suit by a plaintiff, and operates as a bar to any future action. 3 Blk.

In the present case the court will construe the motion of the plaintiff to have been a *retrazit*, and although the court below may have erred in not sustaining the motion, yet as the *retrazit* would have been a bar to another action, he has suffered no injury by that refusal, and such error will be no cause for reversal. The record shows that he had special notice of the defence relied upon—he was not taken by surprise, but took the benefit of all the proof, and the charge of the court, and then claimed the right to enter a non suit. The motion made under the circumstances, by whatever name called, will be regarded as a *retrazit*, and the refusal of the court to allow it was not such error as would entitle the plaintiff to a new trial.

TURLEY, J. delivered the opinion of the court.

This is an action of debt brought by the plaintiff against the defendant, to recover payment of two debts, one for \$1850, due by a bill single executed to John Ray, and by him assigned to the plaintiff; the other for \$2000, due by a promissory note, also executed to John Ray, and by him assigned to the plaintiff. February 4.

The declaration contains two counts, the first upon the bill single, and the other upon the promissory note. On the trial, after the testimony had been closed, and the jury charged, but before they had retired from the bar of the court to render their verdict, the plaintiff moved the court for leave to enter a non suit on the second count of his declaration, which the court refused to permit. The jury returned a verdict for the plaintiff on the first count, and against him on the second, and judgment was given accordingly. To reverse which, so far as it applies to the second count of the declaration, this writ of error is prosecuted.

That the plaintiff, by the principles of the common law, had no right to ask leave of the court to enter a non suit, is un-

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questionably true, for the very principle upon which a non suit is founded, supposes an absence and default in the plaintiff, and that he does not pursue and follow his remedy as he ought. 3 Black. Com. 296, 316, 376; therefore the motion for a non suit had to come from the defendant. If the plaintiff wished to stay his suit, it had to be done either by a *nolle prosequi* or a *retrazit*. That the plaintiff was entitled to enter a *nolle psosequi* upon the second count of his declaration, and thereby prevent a verdict and judgment thereon, is conceded; but it is said, that inasmuch as he applied for leave to enter a non suit, and not a *nolle prosequi*, the court did right in refusing to permit it.

The words *non suit* and *nolle prosequi* being technical terms, and both alike operating to put the plaintiffs out of court, are very liable to be confounded by some thinkers, and in the hurry and confusion of business. Therefore it would be the duty of the court, under such circumstances, always to inform the person making a wrong application, of the right. But without basing any argument upon this remark, it is sufficient for us to observe, that these terms have been so long confounded in the State of Tennessee, as to produce a practice entirely different from that of the common law; by which a plaintiff may, at his own suggestion, unmoved by the operation of the defendant or court, take a non suit, and which cannot be denied him. This practice has been recognised by the act of 1801, c 6, § 58, which provides—"that every person desirous of suffering a non suit on trial at law, shall be barred therefrom, unless he do so before the jury retire from the bar."

To unsettle a practice thus recognized, and of such long standing, might be productive of much mischief; and we can see no reason for doing so. It can make no difference whether you call it a non suit or *nolle prosequi*. When taken by the plaintiff it operates as a *nolle prosequi*, when by the defendants, a non suit; and results in a dispute about names.

But it is said that a non suit as to part is a nonsuit as to the whole, and, therefore, the plaintiff had no right to have a partial non suit of his case.

If the plaintiff be non suited by the defendant, or by order

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of the court, as at common law, his whole case is gone; but when we say that the plaintiff may himself take a non suit, and that it operates as a *nolle prosequi*, it necessarily follows, that under such circumstances it must be governed by the same principles which are applicable to a *nolle prosequi*. If then the plaintiff can enter a *nolle prosequi* as to one count of his declaration, and proceed on the others, which he most unquestionably can, he can also do the same by a non suit. We are, therefore, of the opinion, that the plaintiff ought to have been allowed to enter a non suit on the second count of his declaration, and that it was error in the court to refuse leave.

The judgment will therefore be reversed; and we, proceeding to give such judgment as the court below should have given, direct that a non suit be entered upon the second count, and a judgment final for the plaintiff upon the first count; and that the defendant in error pay the cost both of this court, and the court below.

DEARIN v. FITZPATRICK.

CHANCERY. Husband and Wife—Wife's Equity. It is a well established equitable right of a wife, known by the name of the "Wife's Equity,"—to have settled, upon her and her children, a suitable provision out of her personal estate in the hands of a trustee; as, for example, in those of an executor or administrator. 5 Johns C. R. 464.

SAME. How enforced. This equity will be enforced by decreeing the provision; 1—incidentally, when the husband or his assignee is asking the aid of a court of equity to reduce her property into possession; 2—directly, at the suit of the wife, or of her trustee, paying for the provision; 3—in case the trustee is willing, or designs to pay or deliver the property to the husband or his assignee, without suit, all of them will be enjoined. at the suit of the wife, from changing the possession until provision made.

SAME. Reduced into possession. But no case has gone so far as to decree the provision after the husband or his assignee had reduced the property into possession.

The complainant, Polly Dearin, wife of John Dearin, with whom she intermarried in 1801, was the daughter of John Wilks who died in 1829, leaving a widow and children and

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grand children. Before his death he had made his will, in which were the following clauses.

"I leave unto my beloved wife all my property of every name and grade during her natural life. My will is, that at the decease of my wife, all said property and effects be equally divided between my children and grand children as herinafter named; to wit, Polly Dearin," &c., naming eight legatees.

His widow was 72 or 73 years old at his death. In 1833, John Dearin complainant's husband sold her interest in her fathers estate to the defendant Morgan Fitzpatrick for \$385; and there was then a written assignment thereof executed, in which the complainant joined her husband. The defendant becoming dissatisfied with that instrument, had another drawn up, which he applied to complainant and her husband to execute, and which they accordingly did execute on the 20th of February 1836. It is in the form of an indenture under the seals of Dearin and wife, and purports to convey all her interest in her fathers estate, being one eighth thereof, in consideration of \$385 paid to them by the defendant. This instrument was proved and duly registered in Maury county.

When it was executed Mrs. Dearin was sick and confined to her bed and expressed an unwillingness to sign it, and did it only after asking if her husband had already signed it, seeming to think that if he had signed it was useless for her to refuse her signature. Afterwards, however she expressed herself satisfied with what she had done, because her brothers had entered into a litigation about the estate by which she apprehended would be wasted.

In February 1837, Jane Wilks, the widow of the testator, died; and the legatees and their assignees, shortly afterwards agreed upon a division of the testator's estate amongst them. The share of each in the property then in hand was found to be 912 dollars and 50 cents. To Fitzpatrick a negro named Bob, valued at 900 dollars was assigned, and the residue was paid him in money. This was all that was allotted to him; though there still remained undivided some property, which the executors had not collected at the time of the division and also some property, being the increase of the estate while in the hands of the tenant for life, Jane Wilks.

About the 7th of April, 1837, Mrs. Dearin filed this bill in the chancery court at Shelbyville, whence the cause was, by consent of the parties, afterwards sent to the chancery court at Columbia, against her husband, and Morgan Fitzpatrick, and John and William Wilks, executors of her father's will;--charging that her signature to the assignment of February 20, 1836, had been obtained by fraud and undue influence over her while sick; that no provision out of her fathers estate had ever been made for her; that said assignment purported to transfer to Fitzpatrick all her interest in the testators estate, some of which still remained in the hands of the executors; and praying that said assignment might be declared void; that Fitzpatrick might be decreed to reassign her legacy to a trustee to be appointed by the court, upon the repayment to him of the sum advanced by him to her husband and interest thereon; that the negro Bob might be delivered up; that the executors might be enjoined from paying over to Fitzpatrick any further portion of the testators estate; and decreed to deliver up Bob, or pay over his value; that an account of her share of her father's estate might be taken, and for general relief.

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On the 27th of July, 1837, Fitzpatrick answered. He denied the fraud and misrepresentation charged to have been used by him in procuring the complainant's signature to the assignment; insisted that the sum paid by him to Dearin for his wife's share of her fathers estate was the full value of the expectancy at the time of the purchase; stated that the negro Bob and twelve dollars and a half had been allotted to him as *his entire interest in the estate of John Wilks*, and disclaimed any interest in the remainder of it.

The other defendants filed their answers, from all which and the proof, the cause appeared as it is above stated.

On the hearing on the 22d of September 1838, before chancellor BRAMLITT, he was of opinion that the assignment was void; and he accordingly pronounced a decree annulling it, and directing that the negro should be surrendered up to the complainant on payment to Fitzpatrick of the sum paid Dearin by him with interest, deducting hire. And he referred it to

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the Clerk & Master to take and state the necessary accounts to carry this decree into execution.

The defendant, Fitzpatrick appealed in error.

January 30.

NICHOLSON for the complainant said, the facts stated in the record present the question, whether the assignment by the husband of complainant of her interest in a legacy accruing during coverture to a purchaser for valuable consideration will be declared void? •

In the determination of the question it can make no difference that the complainant joined with her husband in making the assignment. To bind the wife by her consent to her husband's receiving her property she must be in court or lessee commissioners for the purpose; *MElhalton vs. Howell and others*, 4 Hay. 19; Ves. Jr. 500; 3 Cow. 599.

But if the rule were otherwise, the proof in the case shows that her consent was procured under circumstances glaringly fraudulent. She was on a sick bed, was even propped up to sign her name—was too weak to sign it and her husband did it for her, telling her the law required her to execute it. The conveyance then operates only as if executed by her husband alone, and presents the question, whether such a conveyance is valid and defeats the wife of her right to an equitable settlement.

1. By the common law marriage amounts to an absolute gift to the husband of all the goods, personal chattels, and other personal estate, of which the wife is actually or beneficially possessed at that time in her own right and of such others as come to her during her marriage. 1 Rop. Husb. & Wife 169; Com. Dig. Bar. & Fem. E. 3; Clancy on Mar. Wom. B. 1, c. 1 p. 1 to 3.

But to her choses in action the husband is only entitled when they are reduced into his possession during her life; 2 Rop. Husb. & Wife 204; Clan. Mar. Wom. 3 to 9, 442; 2 Atk. 430; 10 Ves. 90.

If the husband can obtain possession of his wife's choses in action, without the aid of a court of chancery, he will be permitted to do so. 2 Story Eq. 632; 3 Cow. 599. To this rule there is one class of cases which form an exception—to wit, legacies to the wife, in which a court of equity will

restrain the husband from proceeding at law until he will make a suitable provision for her. 2 Story 632; 4 Hay 25; Clancy Mar. Wom. 443, 464. Dearin
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It matters not whether the application for the property be made by the husband, or his assignee for valuable consideration; the personal property of a feme covert which is under the protection and control of a court of chancery, cannot be taken from her without her consent in open court, or by a suitable provision made for her,—3 Cow. 606, where all the cases are reviewed and this conclusion drawn as a rule established beyond dispute.

The equity of a wife will not only be enforced in regard to her choses in action and equitable interests against the husband and his assignees where they are plaintiffs, but it will also be enforced when she brings a suit in equity for the purpose of asserting her equity. 2 Story Eq. 642, and cases cited.

The principles here laid down establish the right of the complainant to come into a court of chancery to enforce her equity out of the legacy bequeathed to her by her father; and so far as that portion of the property is concerned, which has not been reduced into possession by her husband's assignee they are conclusive.

But it may be urged that as to the negro, the assignee has reduced him to actual possession and therefore that her equity as to him is gone.

In answer to this position complainant insists, that her husband's assignee took nothing more by his purchase than the right which her husband had, Clancy 504, and that her husband's right was burthened with the condition annexed to it by law, that she was to have her equitable settlement out of the legacy, Clancy 464, 441. His assignee took the assignment with the same burden. Her husband could not have reduced the property to possession without her consent, except upon the condition of taking it as trustee for her benefit and subject to her equity. Had he filed his bill against her father's executors for the property she must necessarily have been joined with him in the bill and the court would then have protected her rights. Her husband's assignee could

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not have proceeded by bill to gain possession of the property without joining her either as plaintiff or defendant, in either of which cases her rights would have been protected; for it cannot be possible that her husband could convey a greater right than he himself possessed.

The property was *en masse* in the hands of the executors as trustees;—the will required it to be divided into eight shares;—the legacies were not specific but general. By our laws there was but one course for the legatees to obtain a division and distribution—that was by bill in chancery,—the property was exclusively under the control of the court and could not legally be withdrawn from its control, except by application to the chancellor. In this application complainant must necessarily have been a party.

It would indeed be an anomaly if her husband's assignee without her consent and without notice to her could enter into such an agreement with the other legatees as would wrest from the court its control over the property and defraud complainant out of her right to a provision.

The circumstances under which the possession was obtained show a design to defeat her equity—the life estate of her mother terminated in April, and in May the legatees together with her husband's assignee and the executors meet together and make a division of the negroes without notice to complainant, and in disregard of the fact that part of the legatees were minors. This proceeding can be viewed in no other light than as a fraud upon complainant's rights, and as an attempt to defeat her equity by a hasty reduction of the property into possession. Besides, although the assignee obtained actual possession of the property, yet his title was incomplete, as both executors have proved that they never assented to the legacy. It is clear that if complainant had had notice of the intended division she could have applied to the chancellor and restrained the parties—it follows that a division made without notice on her part and contrary to law, must be null and void so far as the same was calculated to affect her right.

The argument thus far has been made upon the supposition that the interest assigned by complainant's husband was an immediate interest subject to present enjoyment—that it

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was a legacy which the assignee could reduce into immediate possession. This was not however the case—it was a reversionary interest subject to be enjoyed only after the death of complainant's mother. Her father died in 1829 leaving his property to his wife during her life, and after her death to be divided. In 1836 previous to her death the assignment was made—it was the assignment of an interest to be enjoyed after the termination of a life estate.

There is one other view of this case which is relied upon in support of the decree made below. It is the doctrine of courts of equity, as to constructive frauds, in what are called catching bargains with heirs, reversioners and expectants on the life of their parents, or other ancestors.

In cases of this sort, courts of equity have extended a degree of protection to the parties, approaching to an incapacity to bind themselves absolutely by any contract, and as it were reducing them to the situation of infants, against the effects of their own contract. Hence it is, that in all cases of this sort, it is incumbent upon the party dealing with the heir expectant or reversioner, to establish, not merely that there is no fraud; but to show that a full and adequate consideration has been paid; for mere inadequacy of price is sufficient to set aside the contract. The court will relieve upon a general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. 1 Story's Eq: 329, citing 16 Ves. 512; 17 Ves. 20; 2 Atk. 28; 2 Ves. 149.

In *Shelly vs. Nash*, 3 Mad. R. 232, Sir John Leach uses this strong language, "In more modern times, it has been considered, not only that those who were dealing for their expectancies, but those who were dealing for actual remainders also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs or reversioners, the *onus* of proving that they had paid a fair price; and otherwise to undo their bargains and compel a reconveyance of the property purchased." In the present case, but two witnesses

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speak of the value of the complainant's interest at the time of the purchase; one says, that \$385 was a fair price, and the other says, that at no time since the purchase was the boy Bob worth as little as \$400. The former witness admits that he had purchased the share of another *feme covert* for \$400; his opinion therefore is that of an interested witness, and the defendant has failed to prove that he gave a full and fair price.

The principles applicable to reversionary choses in action and other reversionary equitable interests of the wife are the same with those laid down as applicable to choses in action, subject to immediate enjoyment, except that they are applicable in the former cases in a manner more favorable to her rights than in the latter. 2 Story's Eq. 640.

It is laid down explicitly in the authority just quoted, that "no assignment by the husband, even with her consent and joining in the assignment, will exclude her right of survivorship in such cases. The assignment is not, and it cannot from the nature of things amount to, a reduction into possession of such reversionary interests; and her consent during the coverture to the assignment is not an act obligatory upon her. Nay, in such a case, the wife's consent in court to the transfer to, or by her husband, of such reversionary interest will not be allowed. That consent is not acted upon by the court, except where she is to part with her equity to a settlement, or with her own present separate property; but never for the purpose of parting with her reversionary property, or with the right of survivorship." These positions are sustained by a numerous class of cases cited at page 641 of Story's Eq.

F. B. Fogg, for the defendant, said, the bill cannot be supported. The husband had a clear right to assign; for the assent of the executors to the legacy to the tenant for life, was an assent to the provision in favor of those in remainder. 4 Dev. Rep. 81; 1 Roper, 550, 570; 6 Paige, 356; 2 Story's Eq. 641-9.

The husband and wife are both living, he is in good circumstances, and there is no complaint of his conduct. There is no fraud; and the only witness who testifies about the value

of the property in 1833, says it was worth \$400, and defendant gave \$385. If the property had been lost or destroyed, if the negro had died, the loss would have been that of defendant.

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GREEN, J. delivered the opinion of the court.

In this case, the negro in controversy, being part of a legacy left complainant by her father, was reduced into possession, during her coverture, by the defendant as assignee of her husband. The assignment, by the husband, was for a valuable consideration, without any pretence of fraud as to him; and, to say the least, vested the assignee with all the rights which the husband possessed.

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Had the husband, by agreement with the other legatees, made a division of the estate, and received this negro as his part of the estate, there is no doubt, but that such division would have been legal, and would have vested in the legatees an exclusive right to the portion allotted to each. It is true, had any of the legatees refused to consent to a division; it could not have been procured but by application to a court of chancery. In such case, before the husband, or his assignee could have obtained the complainant's portion of the estate, the chancellor would have made a suitable provision for her. 2 Story's Eq. § 1403, *et seq.*

This was, formerly, as far as the courts would go in favor of a wife's equity for a settlement out of her equitable interests. But it is now settled, that, whenever she is entitled to such settlement against her husband or his assignees, she may assert it by bringing her bill to enjoin the husband or his assignee from reducing such property to possession, until provision shall be made for her. So that there is no distinction founded upon the mere consideration—who is plaintiff on the record. 2 Story's Eq. § 1413; Clancy on Rights, 471 to 475.

But no case has ever gone so far as to entertain a bill, by the wife, for this purpose, after the property has been reduced into possession by the husband or his assignee. This would be attended with infinite embarrassment and mischief. If it could be done at all, it might be done years after the pos-

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session had been acquired, when the character and value of the property may have greatly changed; and after the wife seeking this relief, had contributed to consume the consideration which the assignee had given her husband for her estate.

We therefore think that the complainant is not entitled to the negro in controversy, by way of settlement to her separate use. It is stated in the bill, that the negro does not constitute the entire legacy, to which the defendant claims title, under the assignment; and that a portion of complainant's part of her father's estate, remains to be reduced to possession. But the defendant, in his answer, disclaims any right to receive any thing further under the assignment, and alleges, that he has received the negro in question as his entire share. Upon this subject there is no testimony, so that, in this suit, no decree can be made respecting it.

Let the decree be reversed, and the bill dismissed with costs.

NOTE. Perhaps, chancery ought, on just principles, to restrain the husband from availing himself of any means, *either at law or equity*, of possessing himself of the wife's personal property in action, unless he make a competent provision. . . . Chancery *will* restrain the husband from proceeding in the ecclesiastical courts for the recovery of the wife's legacy, until a provision is made for her; and upon that doctrine a suit at law for a *legacy or distributive share*, ought equally to be restrained, for such rights in action are of an equitable nature, and properly of equitable cognizance. . . . If the husband can acquire possession of his wife's property without a suit at law or in equity,—or, by a suit at law without the aid of chancery,—except, perhaps as to legacies, and portions by will, or inheritance, as has already been suggested,—the husband will not be disturbed in the exercise of that right. 2 Kent's Com. 139 to 142, 3d ed.

CHILDRESS vs. YOURIE.

MISFEASANCE. The performance in an improper manner, place or time, of an act which it was a party's duty, contract or right to do, is a misfeasance. *Chitty's General Practice*, 9.

SAME. Militia Drill. To go through the exercises of the militia drill in the public squares and business resorts of towns and villages is a misfeasance.

SAME. Consequential Damages. The officer under whose command it is done, is responsible for consequential damages; as if a team hitched to a wagon and standing in the usual resorts of business—taking fright at the exercises—run away, whereby one of the horses is killed, the *Captain* is responsible for his value.

Yourie sued Childress on the 9th of February, 1838, in the circuit court of Rutherford *in case*, and declared, that whereas the said James Yourie, heretofore, to wit, on the 8th day of January, 1838, at the county aforesaid, was the lawful owner, and in possession of a certain bay horse, of great value, to wit, of the value of one hundred and twenty-five dollars, which said horse, together with five other horses, also the property of the said James Yourie, was then and there hitched to, and was drawing the wagon of the said James Yourie; along and upon a certain common and public highway, to wit: along and upon the public square and streets of the town of Murfreesborough, the said horses and wagon being controlled and driven by the servant of the said James Yourie, and the said John W. Childress, then and there being the captain and commanding officer of a volunteer company of militia men, calling themselves by the name and style of the Rutherford Greys, who were then and there parading and mustering under the direction and command of the said John W. Childress, upon said public square and streets, in the view of, and within fifty paces of the said horses, so hitched to and drawing said wagon, ordered and commanded said company, then and there being, and so under his command, to discharge and fire off the muskets and mustering arms which they then and there held in their hands, loaded and charged with powder and wadding, or with blank cartridges; and the said company then and there, in view of, and at the distance aforesaid from said horses and wagon, in obedience to the command so given, did discharge off the muskets and mustering arms, held by them as aforesaid, and loaded and

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charged as aforesaid, with a great noise; which firing of said muskets and mustering arms, frightened and alarmed the said bay horse, of the said James Yourie, together with the other horses of the said James Yourie, then and there being hitched to, and drawing the wagon, and driven by the servant of the said James Yourie as aforesaid, and by means of which said firing said horses became ungovernable, and were caused to run off with said wagon with great speed and violence, and by means of which one of the fore legs of the said bay horse was broken, and he was then and there otherwise greatly bruised and injured, by being violently dragged upon the ground by the other horses so hitched to the wagon as aforesaid; and by means of which the said bay horse became, and was of no value to the said James Yourie, and in fact died of the wounds and injury so received, as aforesaid.

The defendant pleaded not guilty; and the parties thereupon, at November Term, 1838, submitted to the court, his Honor Judge RUCKS presiding, instead of *Anderson* Judge, the following agreed case.

The defendant is commander, as captain, of a volunteer company, regularly organized under the laws of Tennessee, the officers commissioned as the law directs, and with arms drawn by the company from the Governor. The company, with the defendant as captain, were mustering in and near Murfreesborough on the 8th of January last; the muster on that day was in pursuance of a previous regular appointment under the constitution of the company. The public square of Murfreesborough was regularly designated by the company as the mustering ground. On the 8th of January the company met in the morning on the public square of said town, and marched to a grove, two or three hundred yards from the square, and drilled for some hours. The drum was beating, the fife playing, and the company firing in the grove. The company then started and went to the square, with fife playing and drum beating all the way from the grove to the square. When the company reached the square, the captain ordered the company to wheel to the right; which order would have taken the company immediately to the wagon of the plaintiff, which was standing on the

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north side of the square, with the horses hitched, under the care of a wagoner hired by plaintiff; but when the defendant saw the wagon he changed his order, and marched the company about mid-way of the square, on the east side from the wagon. The company halted at this place, and under the command of defendant, fired. The horses of plaintiff immediately after the firing, ran off with the wagon; and one of the horses broke his leg, and was killed by plaintiff. The wagoner of plaintiff had sufficient time, after the company reached the square, to have unhitched the horses before the firing; but made no attempt to do so. The wagoner was told by some one to unhitch his horses, that the company were about to fire, and they would run away; but he did not. It is agreed, that beating the drum, playing the fife, and firing, is a part of the drill of a volunteer company, and that the beating of drums, playing of a fife, and the firing of guns, will most generally tend to the frightening of horses.

His Honor gave judgment that the plaintiff recover of the defendant 105 dollars, the amount of damages agreed upon between the parties, costs, &c. The defendant appealed in error.

KEEBLE for the plaintiff in error.

READY for the defendant.

January 31.

REESE, J. delivered the opinion of the court.

Upon the case agreed in this record, we are of opinion that the circuit court pronounced a proper judgment. February 4.

The plaintiff is the captain of a volunteer company in the county of Rutherford, to whom public arms have been furnished. On the day mentioned in the case agreed, the company, under the command of their captain, were made to perform the usual military evolutions, and for three hours were instructed in the exercises of the drill in a grove near the town of Murfreesborough. This was very proper, and at that place the company ought to have been dismissed.

But the captain saw proper to march them, with drum beating, fife playing, and banner displayed, to the public square of the town of Murfreesborough; and when arrived there, caused them to discharge their guns, which frightened the horses of

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the plaintiff below, which were hitched to his wagon, causing them to run away with it, whereby one of them was killed. This was a result very naturally consequent upon the conduct of the officer, and very likely to ensue. His conduct was highly improper. A military parade upon the public square of a town, and the discharge of small arms, may endanger not only the property, but the life of persons, who have a right to be there in the ordinary pursuit of business.

To muster and drill men is a lawful and laudable employment. It is the duty of the officer; but at the same time it must be so conducted, as not to produce injury and loss to others. It must be done in the proper manner, the proper place, and the proper time; not negligently, not wantonly, not so as to injure others. If officers, tempted to exhibit themselves and their troops, in the pride, pomp, and circumstance of *mimic war*, will invade the business resorts of towns and villages; and by unusual sights and sounds frighten the horses, and upset the carriages of their neighbors, they must answer for the consequences.

Let the judgment be affirmed.

NOTE. *Authorities.* *Cole vs. Fisher*, 11 Mass. R. 137. When the law authorizes an act, and nothing is done but what is necessary to accomplish the act, those who perform it, are not liable as trespassers. *Williams vs. Amory*, 14 Mass. R. 20; *Callender vs. Marsh*, 1 Pick. 418. But no man shall be excused of a trespass except it may be adjudged utterly without his fault, and that he committed no negligence to give occasion to the hurt. *Weaver vs. Ward*, Hobart, 134.

GUION vs. BURTON.

DESCENT. *Seizin in deed.* Independently of any statutory provision upon the subject, it may well be doubted whether the rule of the common law ought to be maintained in this country—"That when a person acquires an estate in fee simple in land, by *descent*, it is necessary that he should enter on the lands to gain a *seizin in deed*, in order to transmit it to his heirs." 3 Cruise's Dig. Tit. 29, c 3, § 5; Littleton, § 8.

SAME. *Rule of the Common law repealed.* The act of 1784, c 22, § 2, transmits to the heirs of an intestate owner, whatever right, title or interest he had in the inheritance of land, at his death, without his ever having had any *seizin in deed*. 4 Kent's Com. 398, 3d Ed.

Ejectment for 389 acres of land in the vicinity of Murfreesborough. The action was commenced on the 16th of April, 1831. The notice was served on Samuel Anderson, Robert Jetton, Willie Patrick and Joseph Newman. At October Term, 1831, Frank N. W. Burton was admitted to defend jointly with Anderson, Jetton and Newman, and Burton and David Wendell jointly with Patrick, instead of the casual ejector, upon entering into the common rule. The cause was tried at February Term, 1837, before his Honor, WILLIAM T. BROWN, judge of the 6th, sitting instead of Judge ANDERSON, of the 5th circuit, who was a defendant. The facts submitted to the jury was as follows.

Military warrant, No. 138, was issued to Henry Winborn, of North Carolina, was located by John Drake, on the 7th of February, 1784, and surveyed by B. William Pollock, deputy of Martin Armstrong, on the 15th of March, 1785. By patent, No. 164, founded on said warrant, and dated March 7, 1786, North Carolina granted to said Winborn 389 acres of land—on the waters of Stone's river, so as to include a spring about three-fourths of a mile east of Col. Archibald Lytle's, 7200 acre survey, "beginning at a sycamore tree, about eighty poles below the spring; then 240 poles to a mulberry tree; then south 259½ poles to a hickory, and three small oaks; then west 240 poles to a honey locust and mulberry; then north 259½ poles to the beginning."

The grantee never took possession of the land.

He had a daughter Elizabeth, his only child, born April

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23, 1792. He died two or three years afterwards, that is, in the year 1794 or 1795, intestate. His daughter, and heir at law, married John Guion, who is yet alive, about the 23d of April, 1808, at her age of sixteen years; and on the 21st of February, 1810, gave birth to a son, Henry L. Guion, the lessor of the plaintiff.

Hardy Murfee the ancestor of the defendant, Burton's wife, in clearing an adjoining tract, unintentionally included, in his enclosure made about 1809, an acre or two of the Winborn tract, of which enclosure he held possession till his death, but so far as appears upon the record, without any title.

After that event, to wit, on the 12th of January, 1813, two of the heirs of Hardy Murfree filed their petition for partition of his real estate in the county of Williamson, in which petition they describe the Winborn tract, as part of said Hardy Murfree's estate. Commissioners were appointed to make the partition, who made the valuation and division on the 31st of December, 1813, returned their proceedings to court on the 6th of January, 1814, on which day they were spread of record. Lot No. 4, of this partition, including the Winborn tract, by metes and bounds, was assigned therein, to Lavinia B. Murfree, wife of defendant Burton.

On the 10th of January, 1815, Elizabeth Guion died intestate, leaving the lessor of the plaintiff her only son and heir, and her husband, John Guion, surviving.

The defendant, Burton, took possession of the land, under the partition, about the 10th of January, 1815; and the question below was, whether he took possession before or after that date. For if he took possession before Mrs. Guion's death, it was admitted below, in the argument previous to the motion for the new trial, that the statute of limitations began to operate in the life time of the mother of the lessor of the plaintiff, and that he, though an infant, would be barred in seven years. The jury thought that the possession commenced before the 10th of January, 1815, and they accordingly found for the defendant.

On the motion for the new trial, the question was made, whether Mrs. Guion, who claimed by descent from her father, the grantee, and who never made any entry upon the

land, was vested with such a seizin as would enable her heir to inherit from her? His Honor overruled the motion, and gave judgment on the verdict for the defendants. The plaintiff appealed in error.

READY & MEIGS for the plaintiff said, the first cannon of descent, as laid down by Blackstone, is, "That inheritances shall lineally descend to the issue of the person who *last* died actually seized, *in infinitum*; but shall never lineally ascend." 2 Comm. 208. Lord Coke, 1 Inst. 11 b., says it is a maxim that a man, that claimeth as heir in fee simple to any man by descent, must make himself heir to him that was *last seized* of the actual freehold and inheritance." 2 Thomas Coke, 192, top page. Lord Hale, in the 11th chapter of his History of the Common Law, page 267, says—"The *last actual seizin* in any ancestor, makes him as it were the root of the descent, equally to many intents, as if he had been a purchaser; and therefore he that cannot, according to the rules of descent, derive his succession from him that was last actually seized, though he might have derived it from some precedent ancestor, shall not inherit. And hence, he continues, it is, that where lands descend to the eldest son from the father, and the son enters and dies without issue; his sister of the whole blood shall inherit as heir to the brother, and not the younger son of the half blood; because he cannot be heir to the brother of the half blood: but if the eldest son had survived the father, and died *before entry*, the youngest son should inherit, *as heir to the father*; and not the sister, because he is heir to the father, who was *last actually seized*."

From which this rule is deduced—"That when a person acquires an estate in fee simple in land *by descent*, it is necessary that he should enter on the lands to gain a *seizin in deed*, in order to transmit it to his heir; for if he has seized in law only, it will not be sufficient." 3 Cruise's Dig. Tit. 29, c 3, § 5; 4 Kent's Com. 30; *Jackson vs. Johnson*, 5 Cowen's Rep. 74.

But where an ancestor acquires an estate, *by his own act*, that is, by purchase, he is, in many cases, allowed to trans-

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mit it to his heirs, though he never had actual seizin of it himself. Cruise, *loco cit.* § 7, and Kent.

Thus it seems to be a rule, that to make a man what Lord Hale calls the "root of the descent," he must either make an *actual entry*, to wit, in cases, where the land descends or is devised to him; or he must acquire his estate by some of those means, which are, *per se*, equivalent to actual entry. In other words, he must be last *actually seized*: he must have a *seizin in deed*. This actual seizin, or seizen in deed may be acquired in two ways, as we see from the following passage from 1 Cruise, Tit. 1, Estate in Fee, § 24.

"Where a freehold estate is conveyed to a person by feoffment, with livery of seizin; or by any of those conveyances, which derive their effect from the statute of uses; he acquires a *seizin in deed*, and a *freehold in deed*. But where a freehold estate comes to a person by act of law, as by descent, he only acquires a seizin in law; that is a right to the possession; and his estate is called a freehold in law. For he must make an actual entry on the land to acquire a seizin, and a freehold in deed."

A government patent, or statutory deed duly proved and registered, would vest a man with a *seizen* and *freehold in deed*, and make him the "root of the descent." But if a government grantee, thus vested with a seizin in deed, die, leaving a daughter, to whom the land granted descends, and such daughter marry, have issue and die, it is submitted that, *without an actual entry in her life time*, she is not a "root of descent," and her issue cannot claim by descent from her, nor her husband be tenant by the curtesy.

This is precisely our case. The land was granted by North Carolina to Henry Winborn, who, being thereby vested with a seizin in deed, and a freehold in deed, was a stock from which a descent might be derived. His daughter, Elizabeth, married, had issue, Henry L. Guion, the lessor of the plaintiff, and died, never having actually entered upon the land. We therefore contend, that Henry L. Guion cannot claim by descent from her, who was never clothed with a seizin or freehold in deed, but may claim by descent from his grandfather, who was so seized, and who was the person

last actually seized. And if we are right in this, then the court erred in the charge relative to the statute of limitations; since, as this action was commenced on the 16th of April, 1831, within a few days of the lessor of the plaintiff's coming of age, he is within the saving of the statute, because there was no adverse holding in the time of Winborn, and of course the statute never began to run in his time.

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This doctrine is further illustrated in Burton's Compendium, pl. 301, 302, and by the case of *Doe vs. Keen*, 7 T. R. 386, there cited by the editor, in which case, the authorities, bearing upon the point are collected by the counsel in argument. The counsel also insisted, that the North Carolina act of descents was not intended to alter the nature of the seizin required by the ancient law, to constitute a stock whence a descent might be cast.

JAMES CAMPBELL & F. B. FOGG, for the defendant argued, that at the time of Henry Winborn's death there was no adverse possession of the land, of course his grant drew to it the constructive possession or seizin of the land, and this would be transmitted to the daughter Mrs. Guion on her father's death. The argument of the plaintiff proves too much, for if Mrs. Guion was not seized, because she did not enter, and was invested with no right or title to transmit to her son, then the son for the same reason never had seizin, right or title, and of course cannot sustain an action of ejectment to recover the possession, but would be remitted to his writ of right. The principle contended for by plaintiff's counsel only applies to cases where livery of seizin was necessary to complete the title; not to cases of titles acquired by conveyances under the statute of uses, or conveyances, under our act of 1715, or grants from the state, where the title is complete without livery of seizin. *Green vs. Liler*, 8 Cranch 234. But an answer equally satisfactory to the position contended for by plaintiff, is to be found in our statute of descents, which says, "where any person shall die seized, or possessed, or have any right, or title or interest to any estate or inheritance of lands," &c. This statute makes all rights or interests in lands descendible, and alters the rule of the common law, that an entry and seizin is ne-

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cessary to transmit the inheritance. See Act of 1784, c 22; *Green vs. Liler*, 8 Cranch Rep. 229; *Barr vs. Gratz*, 4 Wheaton, 221, 222. The New York statute, which repeals the principle, that *seizina facit stipitem* is in the very words of our act of 1784. 4 Kent's Com. 387.

February 4.

GREEN, J. delivered the opinion of the court.

Henry Winborn, the grand father of the lessor of the plaintiff, died in 1793, leaving Elizabeth, then married to John Guion, his only child and heir at law. In January, 1815, Elizabeth died, leaving the lessor of the plaintiff, then an infant, her only child and heir at law.—The husband of Elizabeth survived her and is still living. This suit was brought in less than three years after the plaintiff's lessor arrived at the age of 21 years.

The land in controversy was granted to the grandfather of the plaintiff, who never had it in actual possession: nor did the mother of the plaintiff ever enter into possession thereof. The defendant has had possession of the land from a period, commencing before the death of the plaintiff's mother.

Upon this state of facts, the plaintiff insists, that the act of limitations is no bar to his right of recovery, because his mother, not having been seized of this land, could not transmit the inheritance to him,—and consequently, he takes as heir of his grandfather, and not of his mother.

The position assumed by the plaintiff is certainly the doctrine of the common law,—viz. "That when a person acquires an estate in fee simple in land by descent, it is necessary that he should enter on the lands, to gain a *seizin in deed*, in order to transmit it to his heir; for if he has *seizin in law* only, it will not be sufficient"—3 Cruis. Dig. Tit. 29 c 3 § 5; 2 Thomas' Coke 192, top page; 4 Kent Com. 30, 356. If, therefore, the heir, on whom the inheritance had been cast by descent, died before he had acquired the requisite *seizin*, his ancestor, and not himself, became the person last seized of the inheritance, and to whom the claimants must have made themselves heirs.

But this rule of the common law, founded in feudal reasons, that whoever claimed by descent, must make himself heir to

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the first purchaser,—and being heir to the person last seized, furnished presumptive evidence of that fact,—can have very little force, when applied to our modes of conveyance; and the circumstances of this country. Much of our land is waste and uncultivated, and in the actual possession of no one,—an actual entry on these lands would be often difficult, if not impossible; and if made, the evidence of it could not be easily preserved.—To a country such as this, a strict adherence to the common law doctrine of seizin, would be exceedingly inconvenient, and destructive of rights, which it is the office of the law to preserve. It is a settled point with our courts, that the title to wild uncultivated lands, draws to it the possession, so that an action of trespass may be maintained by the owner, who is deemed to be in possession against any one entering on the land and cutting the timber. 4 Kent Com. 30.

This constructive possession continues, in judgment of law, until an adverse possession be clearly made out, 4 Kent 30. It may well be doubted, therefore, whether the common law principle, for which the plaintiff contends, independently of any statutory provision, ought to be maintained in all its vigor in this country.

This question, however, is put beyond doubt, by our statute of descents, 1784, c. 22, § 2, which provides, that, “when any person shall die seized or possessed of, or having any right title or interest in and to any estate of inheritance of land, or other real estate in fee simple, and such person shall die intestate, his or her estate or inheritance shall descend,” &c. By the statute the inheritance is transmitted, whether the person dying intestate had been seized *in deed* of the land or not. If the intestate had any “*right, title or interest*” in the estate, it is transmitted to the heirs of such person. These words necessarily included the interest Mrs. Guion had in the land in controversy, and which was transmitted, at her death to her son, the present plaintiff.

If this view of the effect of our statute required support, it is to be found in the construction chancellor Kent gives to the New York statute upon this subject. That statute contained provisions similar to those in our act 1784. He says,

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4 Kent Com. 287, "The *New York revised statutes* have wisely altered the preexisting law upon this subject; and they have extended the title by descent generally to all the estate owned by the ancestor at his death; and they include in the descent every interest and right, legal and equitable, in lands, tenements, and hereditaments, either seized or possessed by the intestate, or to which he was in any manner entitled, except leases for years, and estates for the life of another person," New York Rev. Stat. Vol. 1, 751, § 1; 754 §27. The words in the statute, "any right, title or interest," are as comprehensive as the words of the law of New York, and if the rule of the English law upon this subject be abolished in that state, it is in like manner abolished here, 4 Kent's Com. 388.

We think therefore, that the plaintiff was entitled as heir of his mother to the land in controversy, and that as the statute of limitations commenced running in her lifetime, it continued running notwithstanding his infancy, and forms a complete bar to his recovery.

Affirm the judgment

NOTE. The statutes regulating DESCENTS—April, 1784, c. 22, October, 1784, c. 10, 1796, c. 13—and the cases decided thereupon, present the following problems and their solutions.

1. Dying seized, without reference to the source whence the seizin proceeded, leaving issue.—In this case, the estate descends to the sons and daughters as tenants in common. 1784, c. 22, s. 2, clause 1st.
2. Dying seized, by purchase, without issue. To the brothers and sisters of the whole and half-blood, viz, of the paternal and maternal lines, alike, as tenants in common. 1784, c. 22, s. 3, clause 1st, 1784, c. 10, s. 2, 1796, c. 13. *Nichol v. Dupree*, 7 Yerger, 415; *Bullard v. Griffin*, 2 Law Repository, 458; and the estate will open to let in after born brothers and sisters, *Cutler v. Cutler*, 2 Hawk, 324.
3. Dying seized, by purchase, or some original acquisition, other than descent or gift from a parent, not having any heirs of the body, nor any brother or sister, or the lawful issue of such—
If the father be living, to him.
If he be dead, and the mother living, to her for life. *Swann v. Mercer*, 2 Haywood, 115; *University v. Holstead*, 2 Law Repository, 406; *Wilsey v. Sawyer*, 1 Murphey, 403; *Roberts v. Jackson*, 4 Yerger, 308; 10 Yerger, 451.
If neither be living, to the heirs on part of the father.
For want of them, to the heirs on part of the mother. 1784, c. 22, s. 7, clause 2d, 1784, c. 10, s. 3. 7 Yerger 423.
4. Dying seized, by derivation from either parent, (otherwise than by descent or by purchase from either,) without leaving any issue, or having any brother or sister or the lawful issue of such to the parent from whom the estate was

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- derived in fee simple. If such parent be dead, to the heirs on the part of such parent. 1784, c. 22, s. 7, clause 1st. *Butler v. King*, 2 Yerger, 115. 116, *Swann v. Mercer*, 2 Haywood, 115 et seq. and 246, et seq.
5. Dying seized, by descent from either parent, without issue. To the brothers and sisters of the whole and half blood, on the part of the parent from whom the estate descended, and their issue. 1784, c. 22, s. 3, proviso 1st, 1784, c. 10, s. 2. *Pipkin v. Coor*, 1 Law Repository, 103; 2 Murphey 231, S. C; *Ham v. Martin*, 1 Hawk 423; *Butler v. King*, 2 Yer. 115.
- In default of them—to the brothers and sisters of the half blood on part of the parent from whom the estate did not descend. Id. and 1796, c. 13. *Ballard v. Hill*, 3 Murphey, 410; *Seville v. Whedbee*, 1 Devereaux, 160.
6. Upon the hypothesis in No. 5, the nephews and nieces of the *propositus* take with his surviving brothers and sisters, *per stirpem*. 1784, c. 22, s. 3, proviso 2d; *Lewis v. Claiborne*, 5 Yerger, 369.
7. Among lineal descendants and collaterals respectively, further removed from the *propositus* than grandchildren, and nephews and nieces, the above rules apply, 1784, c. 22, s. 4. That is—
- In cases where the intestate acquired the estate by *descent*, and the claimants are in equal degree of kindred, the blood of the first purchaser shall prevail. But where the claimants are not in equal degree of kindred, then proximity of kindred shall be preferred, without any regard to the blood of the first purchaser.
- And in all cases, where the intestate, acquired the estate, by purchase, proximity of kindred shall prevail, without giving any preference either to the paternal line, or to the blood of the first purchaser. 2 Haywood, 255, *per BROWN*, in argument.

Descent among illegitimates.

8. 1. If a woman die intestate, without other than illegitimate children, they take her estate, real and personal, by the general rules of descent and distribution, 1819, c. 13.
2. If a bastard die intestate, without issue, his estate goes to his brothers and sisters, i. e. to his mother's children.
3. A child of color cannot inherit the estate of its mother's husband, unless the mother or husband was a person of color, 1825, c. 15.
4. A private law legitimating a bastard as to his putative father, does not render either the father, or the collaterals from him, capable of succeeding to the bastard. *McCormick v. Cantrell*, 7 Yerger, 515; 4 Devereaux, 11, *Drake v. Drake*.
9. A posthumous child of a testator, not provided for in the will, takes such share of his estate as would have fallen to it, in case of intestacy,—to be contributed by the devisees and legatees, in the proportion of their several devises and bequests to the whole estate. 1823, c. 23.

STEWART *vs.* MILLER & MOORE.

JURISDICTION—*Special—judgment when good.* In the exercise of a special jurisdiction, if the proceeding is in the nature of a suit, and the order taken by the court is in the form of a judgment, it will be maintained, though the entry of the adjudication do not show that all the steps required by the act of assembly were taken previously to the judgment.

SLAVES. Emancipation—*Construction of act of 1801, c. 27.* The proceeding, under the act of 1801, c. 27, to emancipate a slave is in the nature of a suit; and if the order of emancipation made of record by the court, recite the matters of fact which constitute the reason of their adjudging the slave to be free, that will be a sufficient emancipation, though the order do not show that the chairman made the report contemplated by the act, that the intention and motives of the emancipator were consistent with the interest and policy of the State.

This was an action of *trespass* brought in Rutherford circuit court, on the 5th of June, 1838, by Stewart, *a man of color*, against Isaac Miller and Josephus Moore. The declaration contained three counts; the first, a count for an aggravated assault and battery, and false imprisonment; the second, for a common assault and battery and false imprisonment; the third, for a common assault and battery.

The defendants pleaded that the "plaintiff, before and at the time of the commencement of the suit, was not, and is not now, a freeman, but on the contrary, was and is now a slave, the property of," &c. This plea was verified by the oath of one of the defendants as a plea in abatement. The plaintiff replied that he was a free man; and issue was thereupon joined.

On the trial of this issue at November Term, 1838, before his Honor Judge ANDERSON and a jury of Rutherford, the plaintiff offered in evidence the following record of the county court of Rutherford, duly authenticated: "STATE OF TENNESSEE—*Rutherford County Court, November Term, 1837.* Petition to emancipate *Stewart*. Be it remembered that on the 6th day of November, 1837, before the worshipful county court, present," &c. (enumerating ten justices,) "and others, justices of said county. The justices holding said court upon the petition of Jacob Wright, executor of Mary McElhatton deceased,—it appearing to the satisfaction of the court, that said Mary McElhatton deceased, declared by her will, which was duly proven and admitted to record in this court at Feb-

ruary Term, 1830, her negro man Stewart to be free, on his paying one hundred and fifty dollars,—and that said one hundred and fifty dollars have been paid to said executor by said Stewart, who, being present and inspected by the court, is more particularly described as follows, to wit:” (then follows a description of the plaintiff’s person.) “And the said Wright having given bond and security, as required by the act of the Legislature in such cases, the Court, composed of the justices aforesaid, do therefore *consider* and *adjudge* that the said Stewart, be held and deemed a free man.”

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On the objection of the defendants’ counsel, this record was excluded by the court. The plaintiff then read the petition of the executor of Mrs. McElhatton addressed to the county court of Rutherford, setting forth the bequest in her will in favor of Stewart; the fact that the condition on which he was to be free had been performed by him, and praying that he might be emancipated.

The defendant then gave evidence that Stewart had been the slave of Mary McElhatton. And upon this state of the proof, his Honor charged the jury that if it was proved to their satisfaction, that the plaintiff had ever been held in slavery, that it was necessary for him to produce record evidence of his freedom before he had a right to recover. The jury found a verdict for the defendants. The plaintiff moved for a new trial, which the court refused, and pronounced judgment in favor of the defendants; whereupon the plaintiff tendered a bill of exceptions setting out the case as above stated, and appealed in error.

The act of 1801, conferring upon the county court jurisdiction to emancipate slaves, provides in the first section—That when any person, being a resident of the state, is owner of slaves whom he is desirous of setting free, he shall prefer a petition to the court of the county in which he resides, setting forth the intension and motives for such emancipation; and if the court, upon examining the reason set forth in said petition, should be of opinion that, acceding to the same, would be consistent with the intent and policy of the state, *the chairman thereof shall report on the petition accordingly, and sign his name thereto, which petition shall be filed in the of-*

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Miller & Moore *file of the clerk of said county.* The argument turned in this court upon the construction of this law.

January 31. **READY**, for the defendants, insisted that the proceedings of the county court in the matter of the emancipation of Stewart, were null, because the report of the chairman had not been made; for, said the counsel, the jurisdiction of the court in the premises is a limited one, and all the matters of fact necessary to give occasion to the exercise of the jurisdiction should appear, or else the proceedings are unsupported by the authority of the law.

KEEBLE, for the plaintiff, said that the petition itself, stating the facts upon which the petitioner based his application, was a sufficient ground to authorise the court to act; that the law did not make the jurisdiction depend upon the report, which was designed simply to satisfy the court of the truth of the facts and motives assigned for the application; that this court would presume the report to have been made, or that the court was otherwise satisfied of the facts, either of which would be sufficient.

GREENE, J. delivered the opinion of the court.

February 4. This is an action for an assault and battery brought by the plaintiff in error, against the defendants in error. The defendants pleaded in abatement, that the plaintiff was a slave.

On the trial of the issue, whether the plaintiff was a free man, or not, he offered in evidence a copy from the records of the county court of Rutherford, by which it appears that a petition had been filed at the November term of that court, 1827, by Jacob Wright, executor of Mary McElhatton, setting forth that the said Mary had departed this life, having first made her will, which had been duly recorded in said court, by which she directed her negro man Stewart to be free, on his paying to his executor \$ 150; that said \$150 had been paid by him, and the said Wright having given bond and security as the law requires, the court, composed of more than nine justices, "consider and adjudge" that said Stewart be held and deemed a free man.

This copy from the minutes of the court, contains also a minute description of Stewart's person.

This evidence was rejected by the court; and a verdict and judgment were pronounced against the plaintiff. Stewart
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We think the record of the proceedings of the court, by which the freedom of the plaintiff was declared and adjudged, ought to have been read as evidence. It is true, the proceedings were not in strict conformity to the provisions of the act of 1801, c. 27. That act does not require the proceedings of the court to be entered upon its minutes; but provides, that the court shall examine the reasons set forth in the petition, and if they shall think that, acceding thereto will be consistent with the interest and policy of the state, the chairman of the court shall report on the petition accordingly, and sign his name thereto, which shall be filed in the office of the clerk of the county. It is further provided that no such petition shall be granted, unless the petitioner first enter into bonds and security to reimburse such damages as the county may sustain in consequence of such slave becoming chargeable, "and upon these requisitions being complied with, such slave shall be held and deemed free."

In this case every thing was done which the law requires, except the making and filing the report of the chairman. But as the subject matter of that report was entered upon the minutes, in presence of the nine justices, and signed by the court, we think there is a substantial compliance with the act of assembly. The proceeding is certainly preserved in a more authentic form than would have been the case had the report been made as the act requires.

This proceeding is in the nature of a suit for freedom. By the act of 1829, c 29, it is made the duty of an executor, where the testator may have set his slave free by his will, to petition the court accordingly; and if he fail or refuse to do so the slave is authorised to file a bill in equity, by his next friend, and upon it being made to appear to the court that such slave ought of right to be free, it shall be so ordered by the court.

In this latter case the proceeding is clearly in the nature of a suit, and so we think in the former; and in either case, if the court having jurisdiction, pronounce judgment that the applicant "shall be held and deemed free," it is sufficient to

Stewart v. Miller & Moore entitle him to his freedom, although there may not be the most exact regularity in the proceeding.

Let the judgment be reversed, and the cause remanded for another trial.

MOSLEY vs. MATTHEWS.

PRACTICE. *Trial—want of plea and issue not aided by verdict.* When there is no plea and no issue joined between the parties, the court has no power to empanel a jury; and if it do, and a verdict be found and judgment pronounced thereupon, the whole proceedings are null. The want of a *similiter*, but not of a plea, will be aided after verdict.

This was an action of trespass commenced in Warren circuit court, by Matthews against Mosely, on the 13th of July, 1831. The declaration, which was entitled as of January Term, 1832, charged an assault and battery, committed by shooting with a pistol. At the same term, the defendant pleaded not guilty, upon which plea issue was joined. The cause was continued till January Term, 1835, when on motion of the defendant, he was permitted to withdraw his plea of not guilty, and file the plea of *son assault demesne*; and the plaintiffs had two months to file his replication, and the defendant till the fourth Monday of June, to make up the issue.

Under this leave, the defendant filed two pleas; in one alleging that the plaintiff, and in the other that the plaintiff, "with divers other persons," &c., made the first assault.

The plaintiff replied, that a state's warrant against the defendant had been issued by a justice of Warren, and placed in the hands of a constable, who summoned the plaintiff to assist him to execute it; that the defendant resisted the execution of the warrant; and the plaintiff, for the purpose of executing it, did assault the defendant, which was the same, &c.; and therefore the defendant of his own wrong, and without the cause assigned in his pleas, committed the trespass in the declaration mentioned; and this, &c., wherefore, &c.

To this replication the defendant demurred generally; and

at January Term, 1836, the plaintiff moved the court to take up the demurrer for argument; but the defendant not being present, the court ordered the argument to stand over till the next term, so as not to delay the trial.

At May Term, 1836, it appearing that both parties resided in that part of Coffee county which had been taken from Warren, the cause was transferred to the former; and there, at May Term, 1837, without any disposition having been made of the demurrer,—and indeed, without any issue of fact being joined between the parties, the cause was submitted to a jury, who heard evidence, and gave a verdict for the plaintiff, and assessed his damages at 300 dollars; and the court, his Honor Judge ANDERSON presiding, pronounced judgment thereupon, from which the defendant appealed in error.

TAUL, for the plaintiff in error.

READY, for the defendant.

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TURLEY, J. delivered the opinion of the court.

This is an action of trespass with force and arms, brought by Kincheon Matthews against Jesse W. Mosley, to recover damages for an assault and battery committed by the defendant upon him, by shooting him. To this action the defendant filed the plea of not guilty, upon which issue was taken; but at a subsequent term he obtained leave to withdraw this plea, and file a special plea of *son assault demesne*, to which the plaintiff specially replied, what in substance is the replication "*de injuria sua propria absque tali causa*"—to this replication the defendant demurred.

The cause was continued from term to term, till May, 1836, when it was submitted to a jury in the circuit court of Coffee county, who were sworn to try the issues joined between the parties, and who returned a verdict, that they found the issues in favor of the plaintiff and assessed his damages to the sum of \$300, upon which verdict the court gave judgment for the plaintiff, from which the defendant prosecuted an appeal to this court.

Can the judgment of the circuit court be sustained?

We think not—there is no issue for a jury to try. The

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court therefore had no power to empanel a jury, and any judgment rendered upon their verdict is a nullity.

It is true, that this court has often said, that the want of a *similiter* will be aided after verdict, but to say, that the want of a plea or issue tendered would be aided by the verdict, would be, to go further than has ever been asked, or can, with a due regard to the preservation of forms of practice be reasonably expected.

But it is contended, that although we must reverse the judgment, yet we can, by virtue of the power given us to render such judgment as the court below ought to have rendered, now determine the question arising upon the demurrer, and give final judgment between the parties.

We do not think so. Holding as we do, that the verdict of the jury, and judgment thereon, is a nullity, the case of course stands, as if no such step had been taken in it; and the demurrer not having been disposed of, there has been no final judgment in the court below, and the case, for this cause, must be remanded. But even supposing that the judgment of the circuit court could be considered as final, still no judgment could be given here, because no damages have been assessed, which can be recognized by the court as the basis of a judgment, there having been no jury legally impaneled by the court to ascertain the same.

We therefore remand the case to the circuit court of Coffee county, with instructions to determine the questions arising upon the demurrer to the replication; and if they should be decided in favor of the plaintiff, then to impanel a jury of inquiry to assess the damages, unless upon application amendments shall be allowed, by which an issue or issues of fact may be made up. upon the merits of the case.

RICHMOND vs. CURDUP.

FRAUD. *Distinction between absolute sale and assignment of consumable articles to secure debts.* An assignment of articles consumable in the using to secure the payment of a debt is fraudulent *per se* if the deed stipulate that the debtor shall retain the possession and use of them. But a reservation by the vendor with the purchaser's consent, of the possession and use of articles absolutely sold, though they are consumable in the use, is only a badge of fraud. 3 Yer. 502; 4 Id. 541; 8 Id. 419.

Trover in Wilson circuit court by Daniel Richmond against James Thomas for a horse and mare. The action was commenced on the 29th of August, 1836. At November term, the death of Thomas was suggested, and a *scire facias* awarded to revive the suit against John Crudup his administrator, to whom the *sci. fa.* was made known on the 7th of February, 1837; and the cause was tried before his Honor Judge DILLAHUNTY and a jury of Wilson at June term, 1838. The defendant had a verdict and the plaintiff's motion for a new trial being overruled, and judgment rendered upon the verdict, the plaintiff tendered exceptions to the opinion of the court, which were signed, and the plaintiff appealed in error. The bill of exceptions does not set out the evidence but only so much of the opinion of his Honor, as the plaintiff considered erroneous; and that is recited in the opinion of this court.

CARUTHERS for the plaintiff in error said that the only ^{February 1} point for the consideration of the court was whether the charge of the circuit Judge declares the law correctly.

That vexed question upon which the discussions both in England and America have been so conflicting, that is, whether the possession of personal property by the vendor or person conveying in trust or by mortgage, is fraud in law, or only *prima facie* evidence of fraud?—was at length settled by this court in *Callen vs. Thompson*, 3 Yer. 475. In that case the law is declared to be that such remaining in possession by the vendor is only a sign or circumstance of fraud, liable to explanation by the vendee.

In the case of *Darwin vs. Handley*, 3 Yer. 502, it is decided that in a case where property is conveyed to a creditor for the purpose of securing his debt, and the same is left in the

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possession of the debtor it is fraudulent *prima facie* if the property be of a nature not consumable by its use, but if any of the articles contained in the deed be consumable in their use the court say "*it would be a badge of fraud so strong as to be almost conclusive, not as a matter of law, but of fact with the jury that the deed was fraudulent;*" page 505. So in this case, even where the property was conveyed to indemnify a surety against a liability for his principal, the court did not go so far as to decide that the possession and use of consumable articles was a fraud *per se* or fraud in law.

In *Sommerville & Crutcher vs. Horton*, 4 Yer. 541, the court has gone so far as to declare that a deed of trust upon articles which are exhausted in their use, where the possession and use is by the face of the deed secured to the debtor, is fraudulent against creditors or purchasers; but I do not understand them to have decided in this or any other case that such would be the law where the deed has no such provision let the facts turn out in the proof as they may.

In *Simpson vs. Mitchel*, 8 Yer. 419, the doctrine laid down in *Darwin vs. Handley*, and *Sommerville vs. Horton* is again reiterated.

JAMES CAMPBELL, for defendant.

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REESE, J. delivered the opinion of the court.

In so much of the charge of the circuit court as is set forth in the bill of exceptions there are two propositions.

1. That upon the *absolute sale* of personal property, where possession neither accompanies, nor follows the sale, that circumstance does not constitute the transaction a fraud in law, but although strongly indicative of fraud, it is susceptible of explanation; and 2. Where there is an *absolute sale* of several articles, some of which are consumable in their nature, such as meat, corn, fodder &c., and possession in like manner neither accompanies nor follows the sale; but they remain in the possession of the vendor, upon an arrangement and understanding with the vendee, that the former might use such consumable article, such arrangement and understanding would make the entire sale fraudulent in law.

This latter proposition is alleged to be erroneous, and the

counsel for the plaintiff below admits it to be so, if the court is to be understood as speaking of an agreement or understanding distinct from and subsequent to the sale. But they insist that the circuit court intended an agreement or understanding which constituted one of the *terms* of the very sale itself.

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We do not understand the charge in this sense. Both propositions relate to an *absolute sale*, and to the effect of the possession continuing with the vendor.

In a case, where none of the articles are in their nature consumable, such possession is a *badge* of fraud, says the court; but when a portion of the articles are in their nature consumable, and the possession continues with the vendor, and the vendee agrees, or consents that the consumable articles may be used by the vendor, this makes the entire sale void in law.

If it were one of the *terms* of the contract of sale, that certain consumable articles should remain with the vendee, and be used by him, it would be a solecism in language to call such transaction an *absolute sale*; for even as between vendor and vendee themselves such articles would not in fact have been sold at all.

Understanding the charge, as we do, and as we think the jury must have understood it, we deem it erroneous. The cases of *Darwin vs. Handley*, 3 Yer. 502; *Sommerville vs. Horton*, 4 Yer. 541; *Simpson vs. Mitchell*, 8 Yer. 419, and a case at the present term of this court, *Trabue vs. Willis*,* decide that where an assignment by deed is made to secure

*TRABUE vs. WILLIS.

FRAUD. *Assignment of consumable articles to secure a debt.* If it be stipulated in an assignment to secure debts, that the assignor shall have the use and possession of consumable articles embraced in the deed, the assignment is void, though he do not in fact use those articles, but they are afterwards sold and the proceeds applied to the payment of his debts.

In this case, which was an appeal from the chancery court at Winchester, a distinction was attempted between it and those cited by the court, upon the ground that the consumable articles, the use of which had been reserved to the debtor in the deed, had not, in point of fact, been used by him, but had been sold and the proceeds applied towards the payment of one of his debts. For the purpose of preserving the answer given by the court to this distinction, so much of the opinion of Judge GREEN as relates to that point is here reported.

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a creditor, and articles consumed by the use of them are included, and there is a reservation of the possession and use of the property, such reservation of consumable articles, manifests the intention of the parties not to have been *bona fide*; and such deed is, on that ground, held to be fraudulent in law.

But if a party *purchase* property absolutely, at a fair and full price, and leave it in possession of the vendor, this, although a strong circumstance of fraud, is subject to be explained, even although some of the articles so left in the possession of the vendor were consumable in the use, and after the sale, the vendee agreed that they might remain and be used.

Let the judgment be reversed, and a new trial be had, and the law on such trial be charged as in this opinion.

After disposing of several other questions which had been raised in the cause, his Honor proceeded.

The only remaining question is, whether the deed of trust is fraudulent? And we think it is. It conveys a large amount of personal property, and among other things, a quantity of *corn* and *fodder*; and there is a stipulation that A. F. Willis to have the use and possession of the property until he should make default of payment. This stipulation for the use of such articles as corn and fodder,—(necessarily consumable in the use,) makes the deed fraudulent upon its face, by its very terms. *Darwin vs. Handley*, 3 Yer. 503; *Crutcher vs. Horton* 4 Yer. 541. It is true the fraud is denied in the answers, and it is said that these consumable articles, were not in fact consumed by A. F. Willis, but were sold and the proceeds applied to the payment of the debts mentioned in the deed. If this were true it could not restore the deed, and give it legal vigor, when the law had pronounced it void. If it was made to hinder and delay creditors, it is void;—and that it may not have had this effect in fact, cannot make it valid.—Otherwise its validity or invalidity would depend, not upon the intention of the parties as proved to exist, or as shown by the terms of the deed,—but upon the manner in which the property should be afterwards treated.

TAUL and MEIGS for complainants.

JAMES CAMPBELL for defendant.

BURTON vs. THE SCHOOL COMMISSIONERS.

CONSTITUTIONAL LAW. *Particular and general laws.* The legislature may, by a particular law, prescribe, as a duty, the doing of certain acts, which, if done, without such authority, would be indictable by the general law

SAME. *Usury.* The act of 1826, c 53, making it the duty of the Bank of the State of Tennessee to loan the depreciated notes of the Nashville Bank, to be repaid in par funds, is constitutional; and an action upon a security executed for notes so loaned, cannot be resisted by the plea of usury.

Quere—Whether the amended constitution has left this power to the legislature? Art. 11, § 7.

In order to prevent the depreciation of the Nashville Bank paper, the Legislature, by the act of 1826, c 41, provided that the notes of that institution and its branches should be received at par from the purchasers of Hiwassee, academy and college lands,—and in payment of one half of all loans and calls upon loans made by the Bank of the State of Tennessee.

It was foreseen that this Bank, by these means, would become possessed of the depreciated notes; and, among other means of making them available, provided by the fourth section of the act, the directors were empowered to reloan them at six or twelve months, or for the shortest time and on the best terms practicable, payable in *sound funds*, bearing an interest of six *per cent*. The directors, moreover, were vested with a discretionary power for converting the depreciated paper into sound funds.

One of the modes adopted, for this purpose, was, to loan the notes in their possession to the debtors of the Nashville Bank, to enable them to liquidate their liabilities to that institution; and the effect of this process was, of course, the same as allowing the Nashville Bank to redeem its notes by assigning to the State Bank its customers' paper,—thus transferring their liabilities from one Bank to the other.

The plaintiff in error, Burton, was one of those customers; and he borrowed from the State Bank an amount of Nashville Bank notes now depreciated equal to his debt to the Nashville Bank with which he paid that debt at *par*. To secure the repayment of the money thus borrowed from the State Bank, he gave his bills single, which were executed to

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a friend, by whom they were endorsed to another friend, who endorsed them to the bank. These bills were renewed from time to time till the first of April, 1834, when two bills were given, one of them for \$1,362 50 cents, payable at twelve months to William Ledbetter, or order, at the office of discount and deposite of the Bank of the United States at Nashville, endorsed by Ledbetter and Samuel Anderson; the other for \$1,400, payable the 1st of December, 1834, endorsed as the first.

In the mean time the legislature passed the act of 1827, c 64, whereby all the capital and interest of the State Bank, with a certain exception, and all moneys then in it, &c., were appropriated to the encouragement and support of common schools forever. The reformed Constitution of 1834, art. 11, § 10, ordained that the Common School Fund should remain a *perpetual fund*, and that the General Assembly should appoint a board of commissioners, who should have the general superintendence of said fund. In compliance with this provision, the legislature, by the act of 1836, c 23, constituted the Treasurer of the state, the Comptroller of the Treasury, and an executive officer to be called the Superintendent of Public Instruction, a body politic and corporate, by the name and style of the Board of Commissioners of Common Schools for the State of Tennessee, to have perpetual succession, &c., but to be subject, nevertheless, to legislative modification, alteration or repeal.

The aforesaid bills of the plaintiff in error, Burton, remaining unpaid, came into the hands of this Board, who, on the 7th of January, 1837, sued him and his endorsers thereupon, in debt, in Davidson circuit court. They pleaded payment, and being at issue upon that plea, it was submitted to the court, upon an agreed case, of which the foregoing is the substance, *whether the contract between them and the State Bank was usurious or not?*

If the court should be of opinion in the negative, the board were to have judgment for the principal, interest, &c., after all just credits, Burton having paid some part of one of the bills. And if the court should hold said contract usurious, the causes were to remain open until it should be ascertained

by agreement or the finding of a jury what amount was due the plaintiff.

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At May Term, 1838, without previously obtaining from the court any opinion upon the question submitted, the causes were brought to trial before his Honor Judge RUCKS and a jury of Davidson, and the plaintiff had a verdict for principal and interest; and his Honor, being of opinion that the contract was not usurious, gave judgment accordingly,—from which judgment the defendants appealed in error.

F. B. FOGG, for the plaintiffs in error.

TRIMBLE, for the defendant in error, said, 1. Upon the ground that the contract between Burton and others and the Nashville Bank was not in itself usurious, it is denied that this contract is usurious. An usurious contract is one in which a higher rate of interest than is allowed by law is directly or indirectly contracted for. The effect of the contract between these parties was simply to shift a debt, which Burton owed the Nashville Bank from that bank to the State Bank, giving him further time for the payment thereof at the rate of six *per cent*.

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The State Bank received the Nashville Bank bills at par, and paid them to Burton at par, made a contract for legal interest only, and will receive nothing beside the legal interest. Burton borrowed money of the Nashville Bank at a time when her notes were at par, the debt became due at a time when her notes were under par; that debt was paid by the Nashville Bank notes, which Burton received from the State Bank dollar for dollar. He loses nothing by the contract. True, he might have bought Nashville Bank bills at some *twenty per cent*. discount, and paid his debt at the Nashville Bank, by which he would have made as much at the expense of the Nashville Bank as he complains has been made at his expense.

This case is clearly distinguishable from the case of the *Nashville Bank vs. Grundy & Hays*. In that case, for ought that appeared in the proof, the jury were bound to find and the court to believe that the defendant, Lanier, must lose by as much as the bills he received were below par, some extravagant sum, as will appear from Judge C.'s calcu-

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lation. In the case now under consideration, the facts agreed and stated are such that this court cannot but see that the State Bank can make only legal interest. Burton can lose nothing, unless he calls it a loss to have had the time of payment extended, at the rate of six *per cent*. He only did not make what by buying the Nashville Bank bills he might have made.

But if this case were not distinguishable from the case before mentioned, I have heard that case questioned and disapproved of by very eminent members of the bar.

2. If this were a case of usury within the principle of the decisions in 1 Yer. 243, 444, certain statutes of the General Assembly, under which this contract was made and entered into by the respective parties, authorised and legalized this particular contract, and all others of the same class. An act to prevent the depreciation of Nashville Bank paper, passed 11 Dec. 1826, c 41, § 4, in so many words required, and authorised this contract.

This act I take to be entirely conclusive upon the question of usury; if it does not conflict with the Constitution of the United States, or Constitution of Tennessee.

If contrary to any particular principle of constitutional law it must be that which inhibits the passage of any partial law.

This is not a partial law. Nashville Bank paper was in circulation throughout the state, and making a very large part of the circulating medium. This act had in contemplation the benefit of all who had such paper, by preventing its depreciation. Again, a portion of it was made to operate to the benefit of all such as had dealings with the Nashville Bank, and this possibly included every man in the community. 2 Yer. 266.

It may be said to be partial in this, that it authorised the State Bank to do that which a citizen would not have done; it authorised the Bank to take one rate of interest, the citizen another and lower rate.

But the State Bank was the exclusive property of the state, conducted by its own agents; and reserving a higher rate of interest to it, was doing nothing more than has always

been allowed to banks. This power has never been questioned. The Union and Planters Bank now by their charters take a higher rate than is permitted a citizen, and yet the power and right have never been questioned.

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TURLEY J. delivered the opinion of the court.

In the year 1826, the legislature of this state passed an act to prevent the depreciation of Nashville Bank paper, by which provision was made, that the notes of the Nashville Bank and its branches should be received at par by the state in payment of debts due from purchasers of Hiwassee and Academy lands, and also in payment of one half of any debt due to the Bank of the State of Tennessee.

This statute makes it the express duty of the directors of the Bank of the State of Tennessee to loan out said money, as fast as it might be received, for the shortest time, and upon the best terms practicable to be repaid in sound or par funds. Session Acts of 1826.

Under the provisions of this statute, the plaintiff in error, Burton, who was a debtor to the Nashville Bank, borrowed the sum now sued for in Nashville Bank paper, and with it paid his debt to the Nashville Bank; and he now asks to be protected against the payment of the principal sum thus borrowed, upon the ground, that at the time the transaction took place, Nashville Bank paper was greatly depreciated, and the contract therefore usurious.

It may be observed, that this application comes with a bad grace. A debt has been contracted with the Nashville Bank, when its paper was at par, and this debt was discharged by the money borrowed from the Bank of the State at par, and no loss whatever was sustained by the transaction. Nothing then but strict law would justify us, in reversing the judgment of the court below. This, it is said, is to be found in the decisions of this court in the cases of the *Nashville Bank vs. Hays*, and *Grundy & Lawrence vs. Morrison*, 1 Yer. 243, 444; these cases determine that a loan of paper money greatly depreciated, to be repaid in sound funds is usurious.

Without questioning the authority of these cases, we do not think them applicable to the one now under considera-

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tion. The act of 1826, as we have seen, authorised and required the directors of the Bank of the State to loan out Nashville Bank paper, to be repaid in par funds, when it could be done.

The legislature certainly had the power to pass this law, and it clearly makes that lawful, which otherwise might have been unlawful under the decisions before referred to. It would involve an absurdity to say, that the legislature had required the directors of the State Bank to perpetrate a crime, for which they might be indicted, and this would be the consequences of decision pronouncing a loan of Nashville Bank paper under the provisions of the act of 1826, usurious.

We are therefore of the opinion, that the contract is legal and that the plaintiffs in error have no cause of complaint against the judgment of the circuit court, which must be affirmed.

MOLLOY vs. ELAM.

EXECUTOR AND ADMINISTRATOR. *What is assets—not a bond of indemnity.*—

Neither a bond of indemnity given to a testator, nor a judgment recovered by him thereupon is assets in the hands of his executor, except to be applied to the purpose of the indemnity; and a bill by his residuary legatees against his executor to compel him to account for such judgment on the ground that, with due diligence, it might have been collected, will not be entertained. But the executor will be compelled in equity to distribute to the residuary legatees any part which he may have collected of such judgment, and which remains in his hands unclaimed by the person against whose demand the indemnity was given.

SAME. *Devastavit by compromising debt.* If an executor or administrator compromise or compound with the obligor in a bond of indemnity given to the deceased, such compromise or compounding would not be sustained to the prejudice of the party against whom the indemnity was given. Williams on Exr. 1107, 8.

CHANCERY. *Injunction against bond of indemnity.* Equity will enjoin the enforcing of a bond of indemnity unless the demand against which it was given has been, or is about to be enforced.

On the 25th of January, 1800, Daniel Elam, the ancestor of the parties, entered into a written contract with James McHenry, then Secretary of War, for the purpose of furnishing

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rations or supplies for the troops of the U. S. in the state of Georgia; and on the same day he gave his bond, with two sureties, in the penalty of \$10,000, conditioned for the performance of all the duties required in the contract,—and to account to the United States for all sums of money advanced to him, by the U. S., to enable him to furnish the supplies, by way of set off against the amount of such supplies, and to repay the surplus to the U. S. on the expiration of the term of the contract, together with interest at six per cent. from the expiration of said term.

Two days afterwards, he took from Solomon and Chas. G. Ellis a bond in the penalty of \$10,000, *reciting* the above facts, and that said Solomon had undertaken to transact all the business which became the duty of the contractor for the state of Georgia, and for so doing to receive all the perquisites and emoluments, which should or ought to be derived in virtue of said contract, and *conditioned*—“that if said Solomon, his heirs, &c. should keep and save harmless said Daniel Elam, his heirs, &c. from all suits, complaints, and also from all damages which might, or should accrue or be sustained by said Daniel, his heirs, &c., in virtue, or in pursuance of, the above recited bond and contract, then this obligation to be void, otherwise to be of full force.”

On the 6th of February, 1801, Daniel Elam, pursuant to the contract, was paid by James Powell, collector of the port of Savannah, \$27,079 49 cents,—which money, being one of the perquisites or emoluments of the contract for supplying the troops, was received by said Solomon Ellis.

On the 9th of February, 1802, the U. S. sued Daniel Elam in the District Court of Georgia, by petition and summons, stating in the petition that he had received the said sum of money; that he had undertaken to account for it, which he neglected and refused to do. And on *the 8th May*, 1804, they recovered judgment for \$31,495 49 cents, debt and damages.

On the 4th of July, 1804, Daniel Elam sued the Ellises, on their bond of indemnity, in the superior court of Columbia county, Georgia; and at *February Term*, 1806, recovered judgment against them for said \$31,495 49 cents, he hav-

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ing remitted the damages found by the jury of \$3779 44 cts. A fi. fa. was issued on this judgment, March 4, 1806, which on the 1st of April was levied on 275 acres of land, which being claimed by Thomas Cobb, the levy was withdrawn; and on the 4th of August, it was levied on a still and cap, which were sold Oct. 7, 1806, for \$13, and then the fi. fa. was returned—"No property found."

On the judgment against Elam, the U. S. issued fi. fas. from Nov. 20, 1805, to Feb. 20, 1813, on which last is this return—"Nulla bona—John Eppinger, M. D. G. November 9, 1813."

On the 5th of February, 1829, Daniel Elam died in Rutherford county, Tennessee, having made his last will, appointing the defendant his executor, who qualified as such, on the 16th of February, 1829. In the will no mention is made of the judgment against the Ellises.

On the 12th of December, 1836, the complainants filed this bill against Elam and A. Ellis, and at the return of the *subpoena*, February Term, 1837, their amended bill, charging that the defendant had compromised with Alfred Ellis, the son and only heir of Charles G. Ellis, for the sum, as defendant admits, says the amended bill, of \$1200, giving up the demand of said judgment; and that said Alfred colluded with the defendant, to keep said compromise concealed from complainants; that said Charles G. Ellis, or his estate, was amply able to pay the whole amount of said judgment, which fact was well known to defendant; praying for an account, and a decree that defendant might be compelled to pay said judgment, &c.

Elam's answer states that in the winter of 1829-30, he went to Cape Girardeau county, where Charles G. and Alfred P. Ellis, his son, resided, said Solomon being then dead, and taking advice of a lawyer was told he could not collect the judgment against said Charles G., who threatened that if he attempted it, he would give information to the government, and cause the collection of the judgment against Daniel Elam; that under these circumstances he did compromise with them, and received in full satisfaction of the judgment against Solomon and C. G. Ellis, the two notes of said Charles G. and

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Alfred P. Ellis, one for \$ 600, payable Nov. 1, 1830, and the other for \$500, payable Nov. 1, 1831; that on the 10th August, 1832, he received payment of the first note, and \$47 50 of the second, which remains unpaid except said payment; that said Ellises lived together in the same house; that all the property they had belonged—by common repute—to Alfred P., who seemed to be worth from 15 to 20 thousand dollars.

There was proof taken by the complainants, showing that the estate of Charles G. Ellis, in Missouri and elsewhere, was considerable; and, therefore, that the defendant might easily have collected a greater amount of the judgment than he had reported he had done. But it is unnecessary to repeat the testimony, because the question debated and decided in this court, was—whether the judgment recovered by Daniel Elam against the Ellises was assets at all?

READY, for the complainants, insisted that the judgment against Sol. and Chas. G. Ellis is conclusive against the parties. The record shows that both parties were in court; the judgment, therefore, cannot be re-examined by a court of equity here. *Winchester vs. Evans*, Cooke 420; *Lawrence vs. Roberts*, 2 Tenn. 236; *Mills vs. Duryee*, 7 Cranch, 487. February 1, 2.

Appellant is liable unless he prove the insolvency of Sol. and Chas. G. Ellis. *Cartwright vs. Cartwright*, 4 Haywood, 134.

The inventories in the record are conclusive as to the solvency of Charles G. Ellis.

Appellant was guilty of a *devastavit* by compromising and releasing the judgment, and is liable for the whole debt. Toller on Executors 425-482; 9 Petersdorff's Abridgment, 361. Title, Executor, *Devastavit*, note ‡; 7 Johns. Rep. 404.

He took the note payable to himself, and is therefore liable. Toller, 425.

F. B. Fogg, and Metes, for the defendant, argued that if an executor find a bond of indemnity among the valuable papers of the deceased, it is his duty to make enquiry, and ascertain whether the deceased has been damnified. If he finds the deceased has been damnified, then he is advertised that he had a right of action against the indemnifier; and the executor is bound to enforce the right of action. But if

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he sees that the deceased had not been damnified, so far from being his duty to sue upon such bond, it is his duty not to sue upon it, but wait until the condition of the bond of indemnity is broken. As soon as it is broken then a right of action accrues, but there is no right to sue till the condition is broken. The fact that the deceased kept the bond in his hands without suing on it, is evidence that he had no cause of action.

In this case, as soon as the Ellises went to Missouri, the judgment recovered in Georgia could be enforced only by suit; and it is, therefore, just like the case of a bond of indemnity, the condition of which is not broken. Daniel Elam had no right to sue upon the Georgia judgment till the United States enforced their judgment against him. He, therefore, held the copy of the record of his recovery against the Ellises in his hands, in order to enforce it for his indemnity whenever he should be damnified,—just as he would have held the bond of indemnity, awaiting a breach of the condition.

It follows that this Georgia judgment is not assets liable to be distributed, any more than a bond of indemnity would be assets, the condition of which remained unbroken. And when the condition is broken, it is only the damages that he is entitled to recover, which are assets. So, in this case, no more of the judgment against the Ellises is assets, than will be sufficient to pay the damages sustained by D. Elam, because of the failure of the Ellises to account to the U. S.

2 Yerg. 484—conclusiveness of the judgment in Geo., 7 John. 404.

9 Petersdorff Ab. 361—liability of executor by release of debt—release of cause of action—the judgment in Georgia was a cause of action.

Toller 481—executor's compounding debt—how liable.

2 John. Cas. 376—held him responsible for the real value.

Ram. on Assets, 495.

February 6.

REESE, J. delivered the opinion of the court.

We are of opinion that the decree of the chancellor, so far as it directs that the defendant shall account for so much of the judgment obtained by the testator in the State of Georgia against Ellis, as might by reasonable care and dili-

gence have been collected from his representatives in Missouri, cannot be sustained.

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The bill itself and other parts of the record, before us show, that the judgment referred to was obtained, to indemnify the testator against a judgment which the United States had recovered against him in the same State, and that the first named judgment was founded upon a bond executed by Ellis to the testator and which stipulated to indemnify him against the claim of the United States. The record also shows that the judgment on behalf of the United States has not been satisfied. If that judgment had been barred by the statute of limitations, extinguished by the lapse of time, or released by the United States, then the judgment of Elam against Ellis, could not in equity, have been collected; or rather all attempts to have collected it at law, would have been enjoined by a court of chancery.

There are but two grounds upon which the executor of Elam could have compelled the representatives of Ellis to have satisfied the judgment. 1. That the judgment in favor of the United States had been paid by Elam or his representatives; 2. That it was in force, and that the executor was liable to pay it and wished to obtain the means to do so from the representatives of Ellis.

It is not alleged or pretended that the first ground exists. The record shews that it does not. And upon the second ground, if we had the representatives of Ellis before this court, and had placed, as we certainly would place, the compromise mentioned in the record out of the question, we might decree against those representatives; but we would look to it, that the money so enforced from them, should be paid, not to the complainants as distributees, but to their creditor the United States.

In this view of the case, we cannot hold the defendant responsible to the complainants for the non-collection of a judgment, which he ought not, and could not have collected except for the purpose of paying it over to the United States.

2. The views above stated have made it somewhat difficult for us to sustain so much of the decree, as directs that the defendant shall account to the complainants for the sum, he

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may have received upon the pretended compromise. For he might well have paid over that sum to the United States, and the complainants could not have murmured. The United States might now claim the amount, and may hereafter claim it.

But as we think that the United States have no *specific* lien upon this fund; as it was not, and is not, the purpose and intention of the defendant to pay it over to the United States; as he made the pretended compromise in the character of executor, and seeks to keep for his own benefit money received in that character,—we are of opinion that the relations between the complainants and the defendant entitle the former, upon their giving refunding bonds, to be severally, as well as the defendant, the depositories of the money until it may be recovered by the United States, and if not so recovered by the United States, or other creditors, to be kept, by them as their own.

The defendant will therefore account for such sums as he has received with interest from the time, he may have received them, and he will be allowed his reasonable expenses for the collection, and the costs will be paid out of the fund,

PEARL vs. NASHVILLE.

CHANCERY. Practice.—*Effect of agreement to take testimony after pro confesso as if answer had been filed.* If after a bill for an account has been taken for confessed it be agreed that it may be referred to the Clerk and Master to take an account, and that the defendant may prove before him by competent testimony any matter of defence to the bill in the same manner, and to the same effect as if an answer had been filed, relying on such matter of defence,—the defendant is not confined to proof adapted merely to limit his responsibility; but may adduce proof to the equity of the bill, and to show that he is not accountable at all.

SAME. Specific execution. The specific execution of a contract for the construction of machinery for a certain purpose, will not be decreed at the suit of the undertaker or his assigns, if the machinery fail to answer the purpose of its construction, though the party, on whose premises and for whose use the work was done, take possession of the premises. To entitle the undertaker to a specific execution in such case, i. e. to a decree for the stipulated compensation for his labor, the party for whom the work was done, must take possession of, use and occupy the works as his own and for the end for which they were designed.

The Mayor and Aldermen of Nashville having entered into a contract with Samuel Stacker for supplying the town with water, which was only partially executed by him, on the 21st of January, 1826, made a contract with Daniel Avery and William L. Ward, to complete the construction of the works begun by Stacker. The terms of this contract were as follows:

Avery and Ward were to procure the necessary machinery for raising the water into the reservoir by steam; to keep the same constantly in operation and repair, so as to furnish an ample supply of water without intermission; to lay down pipes of sufficient calibre to conduct the water from the reservoir to the four corners of the square; to erect at each corner thereof hydrants to be used only in cases of fire, or for the purpose of exercising the fire engines, which hydrants were to be at all times, after the completion of the works, supplied with water; to erect at the intersections of the streets, hydrants to be used and supplied in the same manner, so far as said pipes were to extend under said contract; and to keep an accurate account of their expenditures on account of the works to the time of their completion, to be then filed with the Board of Mayor and Aldermen, verified on oath.

The Mayor and Aldermen, on their part, were, within the year, 1826, to furnish Avery and Ward with 5000 dollars,

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free of interest for ten years, to be expended in the construction of the works, or to liquidate and settle claims to that amount for and on account of the works, to be advanced as the work progressed, but not to exceed the amount expended thereon; to allow Avery and Ward the use, for said works, of all the ground lying between the road which might be constructed, leading to the middle or corporation landing, and a line 100 feet above the lower extremity of the corporation ground.

At the end of the period of ten years from the completion of the works the corporation might take them into their own possession, paying Avery and Ward, or their assigns, the amount expended in their construction over and above the sum of 5000 dollars.

Avery and Ward bound themselves, if the corporation advanced the 5000 dollars within the year, 1826, to have the works completed by the 1st of January, 1827, under the penalty of 100 dollars for every month thereafter that they might be incomplete: and if the works, at any time after their completion, should get out of repair and so remain for the space of ninety days, so that the town should not be supplied with water, then the Mayor and Aldermen might take possession of the works in behalf of the corporation, and use and occupy the same as their own; and be liable, in that case, to pay Avery and Ward only one half of the amount by them expended in the construction of the works, over and above the 5000 dollars.

The corporation advanced the 5000 dollars as stipulated in the above contract, but Avery and Ward failed to complete the works; and having, on the 5th of June, 1827, dissolved their partnership, the corporation, on the 22d of September, entered into a supplemental contract with Avery alone, wherein he bound himself to proceed forthwith to complete said water works, according to the first agreement by the 1st of January, 1828, or on failure therein, to pay the corporation five dollars for each day during which he should fail to have the works completed, and a good and sufficient supply of water in the reservoir for the use of the town: in consideration of which the Corporation was to loan Avery, to enable him to proceed

with the works, one thousand dollars, to be paid to his orders as the work progressed, and to be repaid at the end of one year with interest, and to secure the repayment of which, the corporation were declared to have a lien upon all the machinery and furniture attached to the works, and to the saw mill erected by Avery and Ward, and attached thereto.

On the 30th of June, 1827, Avery conveyed his interest in the water works, under the above recited contracts with the corporation, to Wilkins Tannehill, in trust to secure the payment of \$1067, which he owed to Dyer Pearl & Co; and they, on the 15th of October, 1831, conveyed their interest in the premises to Robert Aldrich, in trust to secure the payment of certain debts, in that deed recited.

Things being in this situation, Dyer and Sylvester Pearl, and Richard Aldrich, on the 16th of April, 1833, filed their bill in the chancery court at Franklin, against the corporation of Nashville, Wilkins Tannehill and Daniel Avery, alleging that the works had been constructed and had supplied the town with water, for which the corporation was indebted to Avery, under the two contracts, in the sum of \$1987 14 cents; that the works and the saw mill thereto attached, had been destroyed by fire about the 9th of March, 1830; that a large sum of money would have been required to repair the works; that Avery was too poor to raise it, and the corporation never offered to make him any further advances, in consequence of which the works had neither been rebuilt nor repaired by Avery, and the corporation had taken possession of the lot of land; and, at the filing of the bill, had and enjoyed it, having dispossessed the tenants by ejectment; And praying that the corporation might be decreed to pay to Aldrich such balance as might be found due from them to Avery; and that the necessary accounts to ascertain that balance might be taken, &c.

Answers were filed by Avery and Tannehill; but the corporation having failed to answer the bill, it was taken for confessed as to them at January Rules, 1834. At May Term, 1835, leave was granted to the Mayor and Aldermen to file the answer of the corporation within 90 days, so as not to delay the trial. On the 3d of November, they filed a demur-

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rer, which was sustained by Chancellor BRAMLITT at April Term, 1836, and the bill dismissed. From this decree the complainants appealed to the supreme court, where, at December Term, 1838, the chancellor's decree was reversed, and a decree pronounced that the corporation should answer, and remanding the cause to the chancery court. In that court, at April Term, 1837, the corporation was allowed till July to file their answer, but having failed to do it, the cause was taken for confessed at October Rules, and set for hearing *ex parte* as to them. At October Term, time was again given the corporation, by consent, till January Rules, 1838, to answer, so as not to delay the trial. Failing to answer, the bill was taken for confessed again at the rules in April; and at April Term, the counsel entered into the following agreement:

"In this cause it is agreed that an account may be ordered to be taken, the same as if an answer was filed. And it is also agreed that the defendants may prove, by competent testimony, before the Clerk and Master, any matter of defence to the said bill in the same manner, and to have the same effect as if an answer was filed relying on such matter of defence. The force of the *pro confesso*, is, however, not to be done away, except so far as it is done away by proof on the part of the said corporation."

And in pursuance of this agreement the court referred the cause to the Clerk and Master, to take and report an account of the expenditures of Avery and Ward, and of Avery alone, under the two contracts with the corporation; on taking which account the parties were to be allowed to make proof according to the above agreement.

At October Term, 1838, the Clerk and Master reported an account of expenditures and advances, which showed an excess of expenditures over advances, on the part of Avery alone, including interest from the 9th of March, 1830, the time when the works had been destroyed, to the 24th of October, 1838, the time when the account was taken, of \$ 3015 41 cents.

On taking the account, the Clerk and Master examined two witnesses on interrogatories, from whose testimony it appear-

ed, that the works constructed by Avery and Ward, and by Avery alone, had proved to be a complete failure; that the "reservoir was a hoax," being incapable of receiving more than four feet of water, which quantity, moreover, was not kept in it; that the engine was not kept in operation more than half the time, and whilst it was stopped there was no supply of water; that the pipes were deficient, and had to be constantly repaired, &c. &c.

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Upon this testimony, and the report, which was not excepted to, his Honor Chancellor BRAMLITT, at October Term, 1838, heard the cause, and being of opinion that the allegations in the bill whereon the complainants sought to ground the relief prayed for, had been disproved by the corporation, and the force and effect of the *pro confesso* done away with under the aforesaid agreement, dismissed the bill with costs.

From which decree the complainants appealed in error.

JAMES CAMPBELL and COOK, for the complainants, said the plain and obvious meaning of the agreement is, that the clerk was to take proof upon the matters referred to him, rebutting or disproving what the corporation had confessed, by failing to answer, and which they would not have been allowed to disprove but for the agreement.

January 6.

The bill alleges that an account of the expenditures was furnished the corporation, which they received and retained without objection, and this is not disproved—nor is it pretended that Avery and Ward, and Daniel Avery, did not, in fact, expend the sums they alledge and charge, they did expend.

Their defence, as now set up, does not rest upon any thing referred to the Clerk and Master—nor upon the facts that the work was not done and received by the corporation, the expenditures incurred, and an account thereof furnished. But the corporation now comes forward and tries to prove, that the work was not done according to contract; that the pipes were of inferior quality; that the location of the reservoir and water works was injudicious, that they could never answer the purpose of supplying the town with water, and that there was not a constant supply of water furnished.

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Complainants say that this evidence, which was introduced before the clerk, is wholly *dehors* the matters in issue.

2. Supposing it was all true, and defendants would now avail themselves of it, yet the location of the water works was fixed by the corporation, and complainants are not responsible therefor.

3. As to the pipes, &c. being of inferior quality, if that objection could have been made, it ought to have been done when the account of expenditures was furnished, or within a reasonable time afterwards.

4. They received the work, and cannot now object, unless for fraud, and no fraud is shown.

5. The covenant itself ascertains and fixes the damages. Avery and Ward are to pay in the event the work should not answer the intended purpose;—for it says, if the work get out of repair and water is not furnished as contracted for at any time, for the space of ninety days together, the corporation may take possession of them, paying Avery and Ward, one half their expenditures over \$5000, &c. The chancellor after he had rendered the decree for an account and report, and after the report had been made and not excepted to, refused to confirm the report, but dismissed the bill—in which it is believed he erred. The proof shows the works in repair when burnt.

WASHINGTON, for the defendant, said—1. The plaintiff in asking equity, must do equity. The corporation has advanced \$5000, under the first contract, and \$680 under the second contract, and in return gets literally nothing.

2. The corporation never took possession of the water works, under the above mentioned provision in the contract; but the further prosecution of the enterprise was abandoned by Avery, leaving the corporation in such possession as, according to the nature of the thing, it had before.

3. As to the possession of the scite for the machinery; that possession, by the contract, was not the exclusive possession of Avery, but was the possession of the corporation by Avery, for the use of the water works. And it was not disturbed until Avery attempted to hold over, in defiance of the corporation, after the destruction of the water works.

4. Avery was, by the construction of the contract, a warrantor of the sufficiency of the water works, in all their parts, for the "constant and abundant" supply of water to the town, for ten years, from the 1st of January, 1828; or until the corporation took possession of them formally, under that provision in the contract already adverted to.

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5. The proof shows that the whole enterprise was a complete failure, produced by the incompetency of the undertaker.

GREEN, J. delivered the opinion of the court.

January 6.

In this case the defendant filed a demurrer to the bill of complaint, which was overruled by the court, and they were ordered to answer. No answer having been filed within the time allowed by the court, the bill was taken *pro confesso*. When the cause was about to be heard, the parties entered into the following agreement.—

"In this cause it is agreed that an account may be ordered to be taken the same as if an answer was filed; and it is also agreed that the defendants may prove by competent testimony before the clerk and master any matter of defence to the said bill in the same manner, and to have the same effect, as if an answer were filed relying on such matter of defence. The force of the *pro confesso* is not however to be done away, except so far as it is done away by proof on the part of said corporation."

The account was taken, and testimony, not relevant to the account, but affecting the right of the complainants to a decree for *any* amount, was taken before the master and reported to the court—whereupon the bill was dismissed.

The first question is, what construction must be given to this agreement of the parties?

The complainants contend that the right of the defendants to produce testimony before the master, was confined to evidence in relation to the items of the account the master was ordered to take; while on the other hand the defendants insist they were permitted to take any testimony, which would have been competent evidence in the cause, if an answer had been filed.

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The true interpretation of this agreement is not without difficulty. The complainants contend with great plausibility, that as the matter referred to the master was the question of account, testimony to be taken before him, must be understood to refer exclusively to that subject. And the defendants urge with great force, that the comprehensive words of the agreement, permitting them to prove by competent testimony any matter of defence to the said bill in the same manner, and to have the same effect, as if an answer were filed, relying on such matter of defence," authorised the testimony in question to be taken.

We do not doubt, but that the gentleman who signed this agreement, on each side, understood it at the time, as they now contend it ought to be construed. We however think with the defendants, that the testimony is admissible under the agreement. If an answer had been filed, denying that Avery and Ward had ever completed the water works, and denying that the corporation had ever taken them into possession, *using* and *occupying* them, it is clear that the testimony of these witnesses would have been relevant to such issues and consequently it must be *competent*, under the agreement.

2. We next come to consider whether upon the bill and proof, the complainant is entitled to a decree.

The first covenant contains the following stipulation: "If at any time after the completion of said works, the same shall get out of repair, and so remain for the space of ninety days, so that the town is not supplied with water as is herein provided, then the mayor and alderman for the time being, may take possession of said works, in behalf of the corporation and use, and occupy the same, as their own, and shall only in such case, be liable to pay Avery and Ward; the one half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as above stated."

The bill alleges "that after the completion of said works on the 1st January, 1828, the said Avery proceeded to supply, and did supply the said town of Nashville according to contract with water without intermission, except for the necessary repairs of machinery, until about the 9th day of

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March 1830, when the building attached to said works, and the said saw mill, were destroyed accidentally by fire, and the machinery of the establishment upon which the supply of water depended were thereby rendered useless. To repair said works would have required a large sum of money, and the said Avery was too poor to raise it, and the said mayor and aldermen never offered to make him any further advances, consequently said works have never been rebuilt or repaired by the said Avery. Your orator further states that the said mayor and aldermen have taken possession of said lot of land, and now have and enjoy the use and occupation thereof, having dispossessed the tenants heretofore in possession by action of ejectment."

The first witness, David M. Moore says, he always considered the water works a failure; that the reservoir was a complete *hoax*; that the pipes were very indifferent, inso-much that he was continually repairing them, and that before the buildings were burned, "the works did not go more than half the time."

Edwin Dibrell says, the water works were so complete a failure and disappointment, that the corporation never attempted to rebuild them, but constructed a different system altogether.

The condition of the covenant, which was to make the corporation liable for half the expense of erecting the water works, depended upon the taking possession of and *using* and *occupying* them as their own. And the question now is, did they do so?

We are of opinion they did not.

True, it is stated in the bill, that the "mayor and aldermen have taken possession of said lot of land, and now have, and enjoy the use and occupation thereof;" and this averment is not disproved, and is therefore to be taken as true. It was upon this averment in the bill that the court, 10 Yer. 179, overruled the demurrer. Nothing appearing to the contrary, the court was of opinion, that possession of the lot of land, upon which the machinery was erected, ought to be regarded as possession of the water works. But *now*, it appears from the proof that the water works were worthless,

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could not have been made to answer the ends of their erection, and were abandoned alike by the corporation and by Avery. The statement in the bill, corroborates this proof. The complainants say, "to repair said works would have required a large sum of money, and the said Avery was too poor to raise it: and the said mayor and aldermen never offered to make him any further advances, *consequently*, the said works have neither been rebuilt or repaired by said Avery."

This statement must be understood, in connexion with the evidence in relation to the worthless character of the works, as an admission that Avery had abandoned all idea of repairing them, before the corporation took possession of the lot of land. They were not repaired by Avery says the bill, in *consequence* of the want of money, which he was too poor to raise. They were not repaired by the corporation says the proof, because they were worthless, and they determined to construct works on a different system.

Upon the whole, it is clear that the corporation did not take possession, *use* and *occupy* the works as their own. This was the condition upon which their liabilities was to depend. The fact, that they may have had possession of them, as incidental to the possession of the land, where the machinery, pipes and reservoir, were situated, does not of itself create their liability.

It was their *use* and *occupation* of them, as *water works*, as *their own*, thus taking a benefit from them, that was to entitle Avery to half their cost. This, it cannot be pretended they have done, and therefore, we think the bill must be dismissed.

Affirm the decree.

CLAIBORNE vs. CROCKETT.

CHANCERY. *Practice*—*Writs of error and supersedeas operate from fiat for.* Under the act of 1811, c 82, § 72, a cause determined in the chancery court is in the supreme court from the date of a judge's fiat for a writ of error and supersedeas, although neither of them are served upon the clerk and master of the Chancery court. St. 3 James 1, c. 8; *Sampson vs. Brown*, 2 East, 439.

SAME. *Effect of fiat on proceedings below.* A sale of land made by the clerk and master of the chancery court, under a decree of that court, after the allowance of a writ of error to, and supersedeas of the decree, is without authority and void.

SAME. *Mode of changing title in equity.* *Quare*, whether, since the act of 1801, c 6, § 48, the mere direction in a decree to the clerk and master to make a deed, and his deed made in conformity thereto, will divest the title out of the person against whom the decree is made, and vest it in the purchaser at the master's sale?

SAME. *Conveyance—Deed under power of attorney.* When the parties in equity in their pleadings treat a title as vested in one of them by virtue of a deed made under a power of attorney, which is not exhibited in the pleadings, the court will take it for granted that the power was well proved for the purpose of authorising the conveyance.

About the 6th of July, 1819, John Brooks sold to James G. Hicks 320 acres of land in Robertson county. Hicks executed four notes to Brooks for the purchase money, two of them for 500 dollars each, payable on the 1st of January, and 1st of May, 1820,—the other two for 1000 dollars each payable on the 1st of January, 1821 and 1822. Brooks executed to Hicks his bond, conditioned to make a title to the land when the last payment should be made, and reserving a lien for the purchase money.

On the 7th of December, 1820, Brooks assigned to William Crocket the above mentioned note of Hicks for one thousand dollars, which was payable on the 1st of January, 1821, and when it became due, Crocket sued Hicks upon it in Kentucky, where he had removed, and recovered a judgment for the balance, about five hundred dollars, which Hicks had failed to pay.

In the mean time, probably in the year 1820, Hicks had assigned Brooks' title bond to Thomas Claiborne; and Brooks having become incapable of transacting his own business, made a power of attorney to his son, John S. Brooks, dated the 10th of February, 1821, giving him a general authority, it seems, to transact his business, including a power to sell

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and convey his real estate. Under this power, John S. Brooks on the 20th of August, 1821, made a deed of conveyance of the land to Claiborne, who took possession and held it till evicted in the manner hereinafter stated.

Crockett having failed to collect the judgment which he had obtained against Hicks in Kentucky, filed his bill at the October Term, 1821, of the circuit court at Charlotte, against John Brooks, John S. Brooks, James G. Hicks, and Thomas Claiborne, to enforce the lien upon the land which he supposed himself to have as assignee of one of the notes given by Hicks for the purchase money.

This cause was heard by Chancellor ANDERSON, on the 18th of June, 1828, in the chancery court at Charlotte, whither it had been transferred, and his Honor pronounced a decree to subject the land to the satisfaction of the complainant's demand.

The defendants presented a copy of the record to Judge WHYTE, and on the 8th of December, 1818, obtained his *fiat* for a writ of error and *supersedeas*, to the supreme court. There, at March Term, 1832, the chancellor's decree was reversed.* In the mean time, however, the chancery court proceeded to execute its decree, and on the 13th of December, 1828, the clerk and master sold the land to Samuel Crockett for 500 dollars, made report of his sale, and it was confirmed at December Term, 1828; and on the 4th of February, 1829, conveyed the land to the purchaser by his official deed, under which Crockett immediately took possession, which he continued till the 6th of October, 1832, when Claiborne filed his bill in the chancery court at Charlotte, to remove the cloud brought upon his title by these proceedings in the chancery court, wherein he charged that he had had possession of the land more than seven years under his deed from Brooks before it was sold by virtue of the decree of the chancery court; that the land was bought by Samuel Crockett at the master's sale for William Crockett, who had since sold it to Wilson Crockett, all of whom he prayed might be made defendants to said bill; and praying further, that the

* See the case, 6 Yer. 27; and see *ante*, *Graham vs. McCann* 11 ell.

proceedings of the chancery court after the granting of the writ of error, might be declared void, and that the title of the defendants might be divested out of them and vested in him, &c.

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The bill was answered by the defendants, and from the pleadings, and documentary proofs, the case appeared as it is above stated. It was brought to hearing at September Term, 1837, of the chancery court at Charlotte, when the chancellor pronounced a decree annulling the master's deed to the defendant Samuel Crockett, *divesting the title out of the defendant and vesting it in complainant*, and ordering the defendants to account for the rents from the date of the master's deed in 1829.

The defendants appealed in error.

JAMES CAMPBELL & F. B. FOGG, for the complainant, February 1. said that the only question was, whether the proceedings in the chancery court were of any force or validity after the cause had been transferred to the supreme court? To show that they were not, they cited 2 Mad. Ch. 189; *Herbert's case*, 3 P. Wms. 116; Act of 1794, c 1, § 69; 1 East, 661; 2 East, 444; Act of 1811, c 72, § 12.

COOK, for the defendants.

GREEN, J. delivered the opinion of the court.

A bill was filed by William Crockett, against Thomas Claiborne and others, in the circuit court of Robertson county, at the October Term, 1821, alledging that John Brooks had sold the tract of land in controversy to James G. Hicks, and had given his bond for the title, and that Hicks had executed his notes for the purchase money. February 7.

The bill alledged further, that Hicks had transferred the title bond to Claiborne, who had obtained a deed for the land, but that he knew at the time he received said deed, that the purchase money had not been paid by Hicks.

The bill further alledged, that Brooks had assigned one of the notes executed by Hicks for the purchase money of the land to Crockett the complainant; that it remained unpaid; that Hicks was insolvent, and that by virtue of said assignment the vendor's lien was transferred to him; and he there-

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fore prayed a decree, subjecting the land to sale in satisfaction of the said note, due from Hicks.

The cause was transferred from the circuit court of Robertson county, to the chancery court at Charlotte; and at the June Term, 1828, of that court, a decree was pronounced in favor of the complainant, ordering said land to be sold.

On the 8th day of December, 1828, a copy of the record was made out and presented to Judge WHITE, one of the Judges of the supreme court, with a petition for *writs of error* and *supersedeas*; and on the same day, the said writs were ordered by the Judge, the record filed with the clerk, and bond and security given as required by law. No writ of *supersedeas* was actually issued and served on the clerk and master of the chancery court, and he proceeded in execution of the decree, and sold the land on 13th December, 1828, to the defendant Samuel Crockett.

At the December Term, 1828, of the chancery court, the report of the sale by the clerk and master was confirmed by the court, and he was ordered to make a deed to the purchaser, which deed was executed on the 4th day of February, 1829. The cause was continued in the supreme court until 1832, when it was heard, and the decree of the chancery court was reversed and the bill dismissed.

The present bill is brought by Claiborne, to remove the cloud which, the proceedings of the chancery court create upon his title, and to divest out of defendants, all the title and interest acquired by them, by virtue of said proceedings.

We think that the cause was in this court on the 8th of December, 1828, and that the *writ of error* operated, by virtue of the fiat of the judge, as a *supersedeas* although no writ of *supersedeas* was served upon the clerk of the chancery court.

The act of 1811, c 72, § 12, provides that a *writ of error* prosecuted in the supreme court, "shall not operate as a *supersedeas*, unless the party suing out the same, shall first obtain from one of the judges of said court, an order for a *supersedeas*," &c.

This is substantially the phraseology of the statute 3 Jac. 1, c 8, which Lord Ellenborough, in *Sampson vs. Brown*, 2 East, 439, says, rendered it unnecessary to sue out the su-

persedeas; for that statute, said his lordship, says that "no execution shall be stayed upon or by any *writ of error* or *supersedeas* thereupon to be sued," &c, unless, &c., which shows that a *writ of error* allowed, or a *writ of supersedeas*, would have had the effect of staying execution." See also *Miller vs. Newbald*, 1 East, 661.

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If this be so, the sale of the land made by the clerk of the chancery court, on the 13th of December, five days after the *writs of error* and *supersedeas* had been allowed, was without authority and is void.

But if the clerk had possessed authority to make the sale on the 13th of December, no title was vested in the purchaser until the sale was confirmed by the court, and the deed was made. But the deed was not made until the 4th of February, 1829, after the session of this court, in which the case was pending, had commenced. Indeed it may be doubted whether the deed of the clerk and master could vest the legal title to the land in the bargainee. By the act of 1801, c 6, § 48, the court is authorised, by its *decree*, to divest the title out of the person against whom the decree may be made, without a conveyance from the party.

The practice before that act had been, to decree that the party having the legal title should make a deed as directed in the decree; but since that act, the practice is, to divest the right by the decree; and a copy of such decree must be registered, as the title of the party in favor of whom it is made. In this case, the decree does not purport to divest the title, but simply confirms the sale, and orders the clerk to make a deed. We do not say that a decree might not be expressed in such terms as to divest the title, and by virtue of the deed of the clerk, vest it in the purchaser; but it is extremely questionable whether the mere direction to the clerk to make a deed, would have that effect.

We think that upon any, or all of these grounds, the defendants acquired no interest in the land in controversy, by reason of the sale and conveyance before mentioned.

2. But it is insisted that Claiborne has not the legal title to this land, and that before the court will decree, that in

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shall be vested in him, it ought to require, that he pay the purchase money which is yet unpaid.

If the fact were as the counsel in argument assumed it to be, and the proper parties were before the court, the consequence for which he contended would certainly follow. But the defendant, William Crockett, in his bill in the original case, alledged that Claiborne had the legal title vested in him, and as we have not the power of attorney before us, and cannot therefore tell whether it is well proved or not, we must take that admission and statement, for the purposes of this decree to be true.

In the view which we have taken of the case, we take from the defendants no title they may have; nor do we vest any in the complainant. So far, therefore, as the decree of the chancellor vests title in the complainant, it must be reversed; and a decree will be entered declaring the proceedings under the decree in the chancery court, after the 8th of December, 1828, to be void; and divesting out of defendant all right and title acquired by said proceedings, and directing an account for the profits, &c.

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INFANCY. *Appearance by attorney.* Where a *sci. fa.* is prosecuted against heirs, some of whom are infants, to subject lands descended to the satisfaction of the ancestor's debt, a general appearance thereto and demurrer by counsel for the defendants, cannot be regarded as an appearance for the infants: more especially if the mandate be to make it known to the guardians.

SAME. *Process void as to infants only irregular as to adults joined therein.*

Though a *sci. fa.* be void as to infants for want of personal service, it will, on that account, only be irregular as to the adults joined therein with them; and a judgment and sale under it will stand till reversed as to the adults, and pass the title of their interest in the land.

WITNESS. *Competency of sheriff to prove want of notice of sale.* The sheriff is competent, but not bound to give evidence of his own failure to give notice of the time and place of sale as required by the act of 1799, c. 14 § 1.

STATUTE OF LIMITATIONS. *Effect of possession by verbal purchase.* A possession of land taken in consequence of a verbal sale is the possession of the vendor and under his title; but if a conveyance be made to the verbal vendee, he may couple his possession before and after the deed together, so as to gain the protection of the statute.

Ejectment for 345 acres of land on Dyer's creek in Stewart county, commenced on the 21st of June, 1836, Stewart circuit court on the demise of Richard, Jonathan, George and William G. Cooley, William H. Haggard and Rebecca his wife, Joseph Webster and Elizabeth his wife and Isaac Piles and Ann his wife, heirs at law of William M. Cooley deceased, against Solomon R. Valentine.

The State of North Carolina granted the premises by patent No. 1159, dated the 26th of November, 1789, to Richard Fenner, assignee of Joshua English, a private in her continental line. The grantee, by deed dated the 15th of October, 1798, conveyed this tract among others to Robert Fenner, who, by his deed dated the 1st of August, 1802, conveyed 308 acres thereof to William M. Cooley, ancestor of the lessors of the plaintiff. About the 25th of January, 1819, William M. Cooley, William Pryor and Young Thornton executed their joint bond in the sum of 2000 dollars to Thomas Clinton, chairman of the county court of Stewart; and afterwards in the year 1823, Cooley died intestate.

Upon said bond, his administrators, Jonathan Cooley and Richard Cooley, were sued in Stewart county court on the 30th of December 1823. They pleaded 1. Conditions performed; 2. Fully administered; 3. Judgments recovered

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against them, to wit,—one in favor of Joseph Webster and wife for 703 dollars,—and one in favor of Ann Cooley for 703 dollars; 4. A retainer for their own demands against the intestate for money due them from the estate of Joel Cooley deceased, 1406 dollars; 5. And lastly, a judgment in favor of the Governor for 591 dollars. To all which pleas there were replications filed, and issues thereupon joined.

These issues were submitted to a jury who found the first against the defendants, and assessed the plaintiffs' damages to 474 dollars 42 cents. But they found the plea of *fully administered* in favor of the administrators, and the court thereupon gave judgment against the administrators for the amount of the damages, and awarded the plaintiffs a *scire facias* against the heirs, in which the sheriff was commanded to make it known to the *guardians* of the infant heirs.

That writ was issued on the 28th of May, 1825, directed to the sheriff of Stewart, and was returned—"executed on Jonathan Cooley, Richard Cooley, 28th May, 1825, on Ann Cooley, guardian of her daughter Ann, the 17th July, 1825." A counterpart directed to the sheriff of Henry was returned—"Came to hand 3d December, 1825, and made known to Joseph Webster and wife on the 21st December 1825."

The next entry on the record is a statement of the case at May term, 1826, against all the *seven* heirs of W. M. Cooley, though there is no return of service of the *sci. fa.* except what is here stated; and the entry proceeds to state that the parties came "by attorneys" and the defendants' demurrer to the *sci. fa.* is overruled, and judgment rendered that the plaintiff have execution.

Then there was a *fi. fa.* issued May, 25, 1826, to the sheriff of Stewart, commanding him to make the money out of the lands and tenements of the defendant, "which belonged to William M. Cooley in his lifetime," and render it to the court at the court house in Dover "*the first Monday in August next.*"

This writ was returned with the following endorsements—"Came to hand the 10th day of June, 1826; levied on three hundred and forty-five acres of land on the 15th of June, 1826; advertised for sale on the *eighth day of August;*" and

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“Levied on the 10th of June, 1826, on 345 acres of land, lying on Dyer’s creek in Stewart county, the place whereon William M. Cooley resided in his lifetime, and where Mrs. Cooley *now* resides; and after having advertised the land according to law, exposed the above tract of land to public sale, at the court house in Dover the 8th day of August, 1826, and sold the same to William Bailey, the county trustee for the use and benefit of Stewart county for the sum of \$499, 38½, the principal, interest and cost of the above debt, which satisfies this execution, 8th August, 1826.”

Besides the widow of the deceased, William G. Cooley, one of his heirs and a lessor of the plaintiff, was in possession of the premises at the date of the sale.

On the 8th of Februrry, 1827, the sheriff conveyed the land by deed to Bailey, the purchaser; and on the 12th of July, 1832, Bailey conveyed it to Christopher C. Clements, who had previously taken possession under a verbal contract, and who by his deed of the 26th of July, 1832, conveyed to the defendant, who immediately took possession, which he continued till the commencement of the suit.

Ann Cooley, the wife of Piles, came of age in 1832.

On the trial, the lessors of plaintiff made title by reading the grant and deeds, including that to their ancestor; and they offered the deposition of Ward, the sheriff of Stewart, taken by the defendant, to prove that he gave no notice, to the tenants in possession of the land, of the time and place of sale as required by the act of 1799, c. 14 § 1. The court refused to permit it to be read, and the plaintiff excepted to this opinion. It was proved that the lessors of the plaintiff are the heirs at law of William M. Cooley, who died seized and possessed of the premises; that the plaintiff was in possession thereof at the commencement of the suit, and that they are covered by the grant and the deeds under which they claim.

The defendant relied upon the proceedings against William M. Cooley’s administrators and heirs, under which the premises had been brought to sale for his debt, and the sheriff’s and the other deeds founded thereupon above recited.

The court charged the jury, in substance, that the writ of *scire facias* should have been served on the minors in per-

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son; that though the cause appeared to be stated as if the infants were parties, yet the demurrer to the *sci. fa.* was to be regarded in law as the demurrer of the guardians only; and that the judgment if void as to the infants was void as to all.

The jury found a verdict for the the plaintiff. The defendant moved for a new trial, which was refused, and he appealed in error.

February 6.

BOYD and COOK for the plaintiff in error said, the first question is as to the validity of the judgment.

Supposing it to be the law that the *sci. fa.* must be served on the infant as well as the guardian, yet that law only applies to the process, and advantage of that defect can only be taken by the infant when there is no appearance entered or plea pleaded.

The object of the writ is to give notice, and is only deemed material for that purpose. Where an appearance is entered and plea pleaded you cannot look to any irregularity in the writ or alledge for error that there was no writ at all.

In this case the attorneys, Martin and Fitzgerald, appear and plead for all the defendants. The record states the case against all the defendants and that the parties appeared by their attorneys and judgment was given against the defendants.

The guardian has the right to enter the appearance for the infant and to plead for him. He can employ counsel and it is his duty to do so. It is not necessary for the guardian or husband to wait for service on the infant or wife, but they can enter their appearance and plead for them, and they are bound by the proceeding, and if the authority is improperly exercised, they must look to the guardian for indemnity. 1 Dev. Eq. Rep. 500; 2 Johns ch. Rep. 139; 1 Paige's Rep. 44; 9 Ves. 488; 1 Harrison Ch. P. 207; Wyatt's Pr. Register, 402 3; Gilbert's Forum Romanum 378; Ves. 141; 2 Atk. 70; 2. Com. Dig. 216; 1 Newl. Ch. Pr. 63.

When an attorney undertakes to appear and plead for a party, adult or infant, the proceeding is regular; the court cannot look farther, and if the attorney has appeared without authority, he is alone responsible. 6 Johns' Reps. 342, 296, *Denton vs. Noyes*; Keble 89; 1 Salk. 86; Com. Dig. Tit. Att.

B. 7; Cro. Jas. 695; *Allisley vs. Colley* 1 Strange 693; 1 Binney 214, *McCulloch vs. Gruffner*; 1 Binn. 469; *Hopkins vs. Waterhouse* at Sparta, 1823 or 1825. Valentine v. Cooley.

The judgment is void as to one for the want of service, is not void as to those who are parties to the record by service and plea. The rule is that all parties before the court are bound by the judgment, however irregular it may be until reversed. One defendant cannot allege that the other is not bound. This is matter of plea in abatement, or if not in abatement, of demurrer. It is a matter for the adjudication of the court and when decided can never be controverted collaterally. 8 Mass Rep. 423, 424, note; 5 Burr 2, 611. *Rice vs. Shute*.

In this case, Clements held under Baily; his possession then was the possession of Baily until he sold to Clements. It is not necessary that there should be a writing in order to constitute a tenancy; that never has been required. Was not Clements Bailey's tenant? Did he not receive the possession from him, and did he not hold under him? Could he resist the recovery of Bailey? Did he not claim and hold under him?

It is not necessary to inquire whether there was such a contract as under the statute of frauds would bind Bailey. Bailey has never denied the contract, but has expressly recognized it in writing, and would be bound; but whether he was or not so far as the possession was concerned, that was transferred, and could be transferred without writing. It is not usual to make written leases for a year, that not being in the statute. If the tenancy is good for one year, the tenant will still be the tenant of the landlord as long as he holds under him, and will then be a tenant at will, or *quasi* tenant at will. A parol purchase under the statute of frauds is good for one year and constitutes a tenancy at will afterwards.

TURNER, F. B. FOGG and MEIGS for the defendants in error, insisted that the sale under the *scire facias* judgment was void, because there was no service of process upon the infant heirs. 10 Yer. 237, *Crutchfield vs. Stewart's lessee*; 4 Yer. 218, *Combs vs. Young*. February 6.

2. That the sheriff's sale was void because one of the de-

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endants and the guardian of the other was in possession, and no written notice of the time and place of sale was given *Trott vs. M'Gavock's lessee*, 1 Yer. 469. *Carney vs. Carney*, 10 Yer. 491.

3. That the sale was void, because made after the first Monday in August, the return day of the execution. It was made on the 8th day of August, which could not by possibility be before or on the 1st Monday, *Oerton vs. Perkins*, 10 Yer. 328. Devereaux and Battles Reports.

4. That if Clements was in possession of the land in 1829, there is nothing to show he had any deed, bond or agreement with Bailey before 1832, and the possession was vacant for some time in 1830.

5. And they further insisted that the sale was void because it is stated in the writ that the infants appeared by attorney, which they cannot do. 2 Petersdorff's Ab. Tit. Attorney V. A. p. 577, where the cases are collected.

February .7

GREEN, J. delivered the opinion of the court.

1. The general appearance to a *sci. fa.*, and demurrer for the defendants by counsel, cannot be regarded as an appearance for the infants, who were not served with process.

In this case, especially, it cannot be so regarded, because the *sci. fa.* commands the sheriff to make it known to the guardians of the infants and not to them personally; therefore when the record shows that the defendants by their counsel demurred, it cannot be intended that the infants, against whom no process had been issued, appeared by counsel.

2. But the court told the jury that if the process had not been served on the infants, it was void as to them, and if void as to the infants, it was void as to the adult defendants, notwithstanding they appeared and put in a demurrer. Although the first branch of this proposition be true, we do not think the latter follows as a consequence.

The infants were not before the court, by the service of the *sci. fa.* on them personally, and therefore as to them the judgment is void. 10 Yer. Rep. 237. And as all the parties were not before the court, the judgment against the adults was irregular, and could have been reversed *in lo-*

to, by writ of error. 2 Petersdoff, 578, pl. 5. But although *erroneous*, it was not void, as to those defendants who were properly before the court. Therefore, we do not think that for *this* reason, the sale was void; but on the contrary, that the title to the land of the adult heirs, might pass to the purchaser at such sale.

3. The court erred also in rejecting the deposition of the sheriff—which was taken to prove that one of the defendants in the execution was in possession of the land at the time of the sale, and that he had not given the twenty days notice required by the act of 1799, c. 14, § 1.

It has always been holden that although the sheriff, who sold the land, was not bound to give evidence, that he had failed to discharge his duty, yet, if he voluntarily chose to do so, he was a competent witness.

4. The court erred in telling the jury, that the possession of C. C. Clements, by virtue of a verbal contract of purchase from Bailey, could not be coupled with his possession, after he had received a deed, so as to protect him by the statute of limitation.

If Clements went into possession, by virtue of a verbal contract of purchase from Bailey, he thereby became tenant at will of Bailey, and his possession, was a possession under the deed of Bailey, which might be coupled with the possession under his own deed, after he had obtained one, so as to protect him by the statute of limitations, if the evidence showed seven years of continuous adverse possession. *Jackson, ex dem. Young et als vs. Ellis and White*, 18 John Rep. 118.

Let the judgment be reversed and the cause remanded for another trial.

KNEELAND vs. ENSLEY.

CONFLICT OF LAWS. *Husband and wife—Marital right to wife's movables and immovables, by what law determined.* The marital right to the wife's *movables* is determined as follows:

1. In case there is no determinate domicile of either husband or wife at the time of the marriage, by the *lex loci contractus*.
2. In case they have different domiciles, by the law of the husband's domicile.
3. In case they agree, previously to the marriage, upon a place of residence after it, and that place actually become the place of the matrimonial domicile, by the law of that place.
4. In case there is a change of domicile after the marriage, the law of the new domicile determines the marital right in the wife's movables acquired after the change in the place of the new domicile.

Immovables. And in all cases, the marital right to the wife's immovables is determined by the *lex loci rei sitæ*.

SAME. Same. *Marital right to wife's acquets after the marriage not in the place of the matrimonial domicile. How marital right is affected by a change of the form of such acquet from immovable to movable, and a reduction of the latter to possession by husband with or without the wife's consent.* If husband and wife have their domicile in Tennessee, and a person die intestate in Louisiana, of whom the wife is a legal heir, leaving movables and immovables, which, on the petition of some of the heirs, are converted into cash or choses in action by a judicial sale,—the conversion, *per se*, will not affect the marital right; but that right will be determined by the law of Tennessee as to so much of the wife's share as was movable, and by the law of Louisiana as to the rest. And the law is the same, though he reduce the share, thus converted, into his possession, if it be done without her consent; but if it be reduced into possession by the husband under a power of attorney from his wife, his marital right will be determined by the law of Tennessee.

Susan Thompson, widow of Jason Thompson, and Ira C. Kneeland, her son by a former marriage, are the complainants.

The complainant, Susan, was the daughter of Arthur and Susan Cobb, who, in her infancy, resided near Natchez, and afterwards in the parish of West Feliciana, in the state of Louisiana, where they died. She first intermarried with William Cobb, at whose death, she received from her father-in-law, Frederick Cobb, as part of her husband's estate, two slaves, *Will* and *Jenny*. She next intermarried with Ira C. Kneeland, father of the other complainant, who was born after the death of his father, which happened in 1809 or 1810. Her father, before his death, gave her two slaves, *Anthony* and *Dick*. After his death in 1811, she received of his estate three slaves, *Thomas*, *Isham* and *Jacob*. In Decem-

ber, 1811, she intermarried with Jason Thompson, who was a citizen of Davidson county, Tennessee, where he had a farm, other property and a family. At the time of this marriage, the complainant, Susan, was possessed of the property received from the estate of her husband, William Cobb, and her father, Arthur Cobb; namely, of the slaves, *Will, Jenny, Anthony, Dick, Thomas, Isham* and *Jacob*.

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Thompson, after the marriage, which was celebrated at the place of complainant, Susan's residence, took upon himself the control of her property as well as his own; and sold her slave *Will* for 900 dollars, and *Thomas* for 250 dollars. He settled on the plantation occupied by his wife, where, with her slaves and three or four of his own, he made a crop in the year 1812. In the month of May, that year, he quarrelled with his wife's relations, the Cobbs, about the division of Arthur Cobb's estate; and in a fight with one of them, gave him a mortal wound. Before this occurrence he had not been heard to say any thing of removing, but afterwards he told Flowers, his near neighbor, and who subsequently became his agent, that he would leave the state. He did return to Tennessee in November or December, 1812, bringing with him all his wife's property above mentioned, except the slaves sold, and the proceeds of the cotton crop of 1811, which he had also sold.

In 1819, Susan Cobb, mother of complainant, Susan, died, and her estate was administered by the parish judge according to the laws of Louisiana, where the administration is conducted as a suit. In this process, the complainant, Susan, was represented by Benjamin Scurlock, who was appointed her attorney by the parish judge.

From his record it appears that the estate consisted of 500 arpents of land, about forty slaves, stock, &c. &c. On the 23d of November, 1819, some of the heirs petitioned for a sale of the estate on a credit of one, two and three years, which was ordered accordingly. The sale was made; and on the 22d of April, 1820, the judge proceeded to form the *mass* of the estate, which, after paying the debts, was found to be \$46,787 29 cents, which, when divided amongst seven heirs,

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gave each \$6683 87 cents. The third lot consisting of divers *choses in action*, was assigned to Mrs. Thompson.

Thompson procured from his wife a power of attorney, dated the 4th of January, 1824, to ask, demand and receive her share of said estate. He filed this power with the parish judge, and it was recorded in his office, after which he proceeded to collect said share, some part of which he reduced to his possession, and managed it as his own property; but some of it remained uncollected, it is probable, at his death, which occurred on the 22d of April, 1833. Before his death he had made his will, in which he gave his own property, and all his wife's besides, to his own children. To complainant Kneeland, his wife's only child by her former marriage, he gave a very inconsiderable legacy, and withal annexed to it such burdensome conditions as to make it worthless.

Complainant, his widow, dissented from his will, and having transferred to her son, the other complainant, all her demands against Thompson's estate on account of her Louisiana property, joined him in filing this bill in the chancery court at Franklin, on the 17th of October, 1835, against Enoch Ensley, administrator with the will annexed, of Jason Thompson and John McNairy Thompson, who had taken possession of one of her negroes, Anthony, under a gift from his father in his life time.

Answers were filed, and testimony taken, from all which the case appeared as above stated.

At April Term, 1838, the cause was heard by Chancellor BRAMLITT upon the pleadings and proofs, among which was the printed code of Louisiana of 1808, admitted as if proved. His Honor declared that the estate of Jason Thompson was accountable to the complainants as follows, and not otherwise—1. For all the property of which complainant, Susan, was possessed at the time of her marriage with Thompson, whether movable or immovable. 2. For all immovable property, which was of her share of her mother's estate. 3. For the profits of said property, which accrued, or might have been made after the death of Thompson, whether such profits consisted of the rent of lands, hire of slaves or interest of money. 4. For any profits of said property which accrued

before the death of Thompson, and remained unexpended at his death.

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That said Susan was entitled to have restored to her all of said property, which remained in kind either in the hands of Thompson's personal representatives, or in the hands of his heirs or voluntary donee. And finally, that said Jason Thompson's estate in Louisiana was charged, as by a tacit mortgage, to render said account. But because it was unknown to the court what property said Susan was seized and possessed of at the time of the marriage; what immovable property came to her by succession to said Susan Cobb; what profits may have accrued on said property at the period above expressed; and what property yet remains in kind to which said Susan is entitled as aforesaid: it was referred to the Clerk and Master to take and state an account in the premises, and report thereof to the next term of the court.

From this decree the defendants appealed in error.

WASHINGTON and MEIGS, for the complainant, said—
There does not appear to have been any marriage contract January 1.
between complainant Susan and Thompson—in which case,
“in relation to property, the law only regulates the conjugal
association.” La. Code, art. 2305; Code of 1808, p. 324,
art. 8. The law divides the property of married persons into
separate property and *common* property. Separate property
is that which either party brings in marriage, or acquires dur-
ing the marriage, by inheritance or donation made to him or her,
particularly. Code, art. 2314. The separate property of the
wife is divided into *dotal* and *extradotal*. Art. 2315; Code
of 1808, p. 324, arts. 11, 12, 13, 14. No property is dotal
but what is so declared by the marriage contract. Code, art.
2317, 2318. All property not made dotal by the contract, is
paraphernal. Arts. 2315, 2360. See also *The Partidas*, vol.
I, p. 523, law 17; Code of 1808, page 334. Therefore, as
there was no contract in this case, all the separate property of
Mrs. Thompson, which she brought in marriage, i. e. had at
the time of the marriage, or acquired during the marriage, was
paraphernal. As to the administration of paraphernal prop-
erty, and the disposition of it on the dissolution of the mar-
riage, see code of 1808, page 334, *et seq.* As the marriage

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in this case was contracted and celebrated in Louisiana, there would be no difficulty in deciding if there had been no change of domicile during the marriage. The law upon this point, may be seen in Story's Conflict of Laws, from section 157 to 159 inclusive, where it is laid down, after a very full comparison, (in previous sections) of authorities, in accordance with the decisions of the supreme court of Louisiana, the result of which is stated in § 158, to be—"that in case of a marriage without any express contract, the *lex loci contractus* will govern as to all movable and immovable property within the country"—p. 142—and also to all movables out of the country.

But where there is a change of domicile, two questions present themselves—1. What is the law in relation to property acquired before the removal? 2. In relation to property acquired afterwards *in the new domicile*. The supreme court of Louisiana has settled these questions in the following way:—"Where there is no express contract, the law of the matrimonial domicile is to prevail as to the antecedent property; but the property acquired after the removal—in the place to which they have removed—is governed by the laws of that place." Story, § 178, and authorities cited.

But in this case a further question arises, the decision of which is important with reference to the movable property, that is, with reference to Mrs. Thompson's share of her mother's estate. The question referred to is—What is to be regarded as the matrimonial domicile in this case? And it is admitted, that if the court should think, in point of fact, that, at the time of the marriage, the parties intended to fix their domicile in Tennessee, that would be the matrimonial domicile, and the law of Tennessee would govern as to community of movable property previously acquired; in other words, there would be no community; Story, § 198; and the same rule would, in that case, apply to movable property which might afterwards descend to the wife in Louisiana.

The movable property of the married couple is governed by the law, neither of the previous domicile of the husband, nor of the wife, but by the law of the *intended* domicile. Story, § 194. Partidas, page 532 and note. And this is not that

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domicil, which the *husband* secretly and separately intends, but that which is mutually intended both by the husband and wife. The court will then have to be satisfied that Tennessee was mutually intended to be made the domicil of the spouses at the time of the marriage. Otherwise, all the just expectations of the wife might be disappointed by a change of domicil, either secretly intended by the husband at the time of the marriage, or arbitrarily resolved upon by him after the marriage.

If the court should be of opinion that it was not mutually intended by the parties to make Tennessee their domicil; or, which is the same thing, that there is no evidence of such intention, then the case will be governed by the 24th Law of the 11th title of the fourth Partida, which declares—that the law of the country where the marriage was contracted, ought to have effect as it regards the dowry and arras; and also with respect to property acquired during the marriage. See 1 Moreau and Carleton's Partidas, 532, and the note there. *Le Breton vs. Nouchet*, 3 Martin, 60 *et seq.*

The note upon the law just mentioned is by an approved commentator; he is referred to with approbation by Mr. Livingston in the argument of the case of *Le Breton vs. Nouchet*, 3 Martin 62, 63. And this note settles all the questions above mentioned, as they have since been by the supreme court of Louisiana.

From all which they said the following propositions resulted—

1. That if Mrs. Kneeland, at the time of her intermarriage with Thompson, had been domiciled in Tennessee, the negroes, then in her possession, would have been Thompson's, *jure mariti*.

2. That the law would be the same, if, at the time of the marriage, both parties *intended* to remove from Louisiana, where the marriage was contracted, to Tennessee; in other words, that Tennessee was to be the place of their residence. Because, in that case, Tennessee would be, in contemplation of law, the matrimonial domicil.

3. But they were married in Louisiana, and the law presumes the place of the marriage to be the intended matrimonial

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ial domicil. And this presumption will stand till it is removed by proof.

The proof must show, that at the time of, that is, before the marriage—

1. Either the husband declared his intent to make Tennessee the matrimonial domicil, and the wife acquiesced.

2. Or that it was mutually agreed between them, that, Tennessee should be the matrimonial domicil.

In either of these cases, the wife, in legal contemplation, contracts to surrender to her husband the marital rights of the state intended to be the matrimonial domicil.

But a secret intent, in the mind of the husband, not expressed and acquiesced in, or agreed to by the wife, would not have the effect of making some other than the place of marriage, the matrimonial domicil.

4. That the property which descended to Mrs. Thompson in 1819, from the estate of her grandmother, Mrs. Cobb, if immovable, would not be affected by the Tennessee marital right.

F. B. Fogg and E. H. Ewing for the defendants, said,—that although the slaves were immovable irrespective of the matrimonial domicil, yet, as they were Mrs. Thompson's paraphernal property, she could control them, and consent to their being converted into cash, which she had actually done; that having done this, and the husband having reduced them into possession when thus converted, the law of the matrimonial domicil would attach upon their proceeds. And they cited, upon this point, the Digest of 1808, p. 334, art. 60; Story's Conf. 171, 198; Digest, p. 28, art. 22, 23, 24; p. 334, arts. 59, 60.

But if her assent and acquiescence for 20 years did not destroy the immovable nature of the property, in relation to the marital rights, it is contrary to the policy of our law to enforce or encourage such claims; and no state is bound to respect the peculiar legislation of other governments, when adverse to its own interest and policy. Story's Conf. § 25.

2. As to the property derived from Susan Cobb, they insisted that the law of the actual domicil governs it, because it had been converted into cash by a judicial sale, in which Mrs.

Thompson was represented, and she had given her husband a power of attorney to receive the proceeds; and they said it was impossible to distinguish this from the case of the sale of a wife's realty with us from the necessity of partition, in which case the proceeds would go to the husband as personalty. They cited Digest 172, 4; 186, 187.

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TURLEY J. delivered the opinion of the court.

This bill is filed by Susan Thompson, widow of Jason Thompson, deceased, and Ira C. Kneeland, her son by a former marriage, to recover property claimed by her against the estate of the said Jason Thompson, as belonging to her in her individual right by the operation of the laws of Louisiana, the place of her residence when last married.

Their right to the relief sought depends upon a construction of the law as applicable to the case, upon the following facts.

Mrs. Thompson, the widow of Ira C. Kneeland, resided in the state of Louisiana, and Jason Thompson resided in the state of Tennessee, they intermarried in the state of Louisiana; at the time of the marriage Mrs. Kneeland was possessed of property, movable and immovable. In some short time after the intermarriage they removed to the state of Tennessee, the domicil of the husband, and afterwards other property, movable and immovable, descended to Mrs. Thompson, upon the death of her mother Susan Cobb, a resident citizen of the state of Louisiana.

The question presented for consideration is,—what rights did Jason Thompson, the husband, acquire by virtue of the marriage, over the property of his wife Susan?

By the principles of international law, we consider the following propositions upon this subject settled.

1. If there be no determinate domicil of either the husband or wife, at the time of the marriage, the *lex loci contractus* governs the husband's right to the movable property of his wife at the time of the contract, and the *lex rei sitæ*, to the immovable.

2. If the husband and wife have different domicils, the law of that of the husband is to prevail as to the wife's movable

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property, because the wife is presumed to follow the domicil of the husband.

3. If the parties, at the time of the contract, had reference to another state than the one where it was made, as the place where they intended to live, that the law of the place of intended residence, if it become the actual residence, will govern the right of the husband to the movable property of the wife, and not the *lex loci contractus*.

If there has been a change of the domicil after the marriage, the law of the new domicil shall govern the right of the husband to the movable property of the wife acquired after the change, and not the *lex loci contractus*. See Story's Conflict of Laws, from § 143 to § 189, from which we think these principles are clearly deducible. But it is to be observed, that the correctness of these propositions of necessity depends upon the facts, that there has been no express contract between the parties, by which these rights have been changed.

At the time of the marriage between Jason Thompson and his wife Susan, the domicil of Jason Thompson was in the state of Tennessee, that of his wife in the state of Louisiana, which was also the *locus contractus*. After the marriage, the residence of the parties became the state of Tennessee, where Jason Thompson died.

From the principles above deduced, then it necessarily follows, that, inasmuch as by the laws of the state of Tennessee the husband acquires an absolute right to the movable property of his wife, Jason Thompson, by virtue of his marriage in the state of Louisiana, acquired such right to the movable property of his wife as belonged to her at the time of her marriage, or which she may have acquired from any source whatever since that event and his death, and which he may have reduced into possession during his life time.

This makes it necessary for us to enquire what property is movable and what is immovable by the laws of Louisiana.

It has been held at the present term of the court, in the case of *McCollum & al. vs. Smith*, "that every state may impress upon all property within its own territory, any character it may choose, and no other state or nation can impugn or vary that character.

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Upon an examination of the laws of the state of Louisiana, Digest of 1808, page 96, c. 2, Title Immovables, it will be seen that all the lands and the appurtenances thereto belonging, slaves, cattle intended for cultivation, implements of husbandry, and other things not necessary to be specified in this case, are declared to be immovable.

To all property of this description then, Jason Thompson obtained no right by virtue of his marriage with his wife, whether the same was acquired before or after that event, in the state of Louisiana. And for so much of it as may now be in the possession of his administrator, or may have been used by him during coverture without his wife's consent, his estate must account to the complainants. But his right to every other species of property, and which may be embraced under the title of movable, is, by virtue of the marriage, paramount to that of his wife, and must prevail against it. And, under this head, will be classed all the property, both movable and immovable, which descended to Mrs. Thompson from the estate of her mother, Susan Cobb, which was sold by the order of the parish court in the state of Louisiana, for the purpose of making a division and distribution between the heirs, and the proceeds of which were received by Jason Thompson, under a power of attorney from his wife.

In this case, the immovable estate of Mrs. Thompson, which was converted into movable, or personal, property, in Louisiana, by operation of law, and which was afterwards received by Jason Thompson, or by virtue of the power of attorney of his wife, without qualification, and without any agreement, that it should be held for her separate use; became, by virtue of such reception, his absolute property.

If any of her property, which was immovable by the laws of Louisiana, remains in specie in the possession of any of the defendants, the complainant is entitled to have it delivered up to him, and to an account for hire or profits from the date of Thompson's death. Or, if any such property were converted to personal, by Thompson, or by a decree of the court, and he became possessed thereof without his wife's consent, his administrator must account therefor with interest.

The decree of the chancellor will therefore be reversed

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and reformed, so as to charge the estate of Jason Thompson in accordance with this opinion, giving interest on all sums of money received by him in his life time, by a conversion of the immovable property of his wife from the date of his death, and hire at a reasonable rate for all, which may have come to the hands of the administrators of Jason Thompson, in kind from the same period. •

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✓ **GIFT.** *Inter vivos and mortis causa of securities for money.* Choses in action may be validly given *mortis causa*; and *a fortiori*, they are the subject of a valid donation *inter vivos*. And a mere delivery accompanied by words of donation will be a good gift of them, and operate to vest in the donee a property in the money secured by them.

SUCCESSION—*to intestate.* *Whether widow can claim collation of advancements.* Under the North Carolina act of 1784, c. 22, § 8, the widow of an intestate is not entitled to have advancements to his children in his lifetime collated, so as to form, of the advancements and the residue on hands at the death, a mass to be divided between her and the children. She is only entitled to a share of what remains after deducting the advancements.

Doctor Asahel Brunson of Montgomery county was seized and possessed of a large real and personal estate. He had four sons, Jesse A., Robert, Ashbell and Asahel, to whom he made, from time to time, considerable advancements. Asahel, the last mentioned, died leaving three children, Joseph, Penelope and Asahel. The surviving brothers became embarrassed in their circumstances; and in order to relieve them, Doctor Brunson in 1826, placed in the hands of one of them, Jesse A. Brunson, to be collected by him and applied to that purpose, several securities for money, consisting of two judgments against Willie Blount, and divers notes upon other persons, amounting exclusive of interest, to a little more than 12,000 dollars. Jesse A. Brunson proceeded to collect these demands, and in doing so, caused the judgments against Blount to be levied upon land in Montgomery and Robertson counties, which he purchased himself at the sheriff's sale. But before the collection of these demands had been completed, or the money paid over to the

brothers, Doctor Brunson, on the 17th of November, 1827, died intestate, and Jesse A. Brunson was appointed his administrator in January 1828. He left a widow, Penelope. In February following, Ashbell Brunson died intestate, leaving a widow, Elizabeth, and three infant children, Isaac, Elizabeth and Penelope, entitled to his share, if any, of Doctor Brunson's estate. Isaac Dortch was appointed administrator of Ashbell Brunson in April 1828.

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On the 11th of November 1829, Dortch filed his bill in the chancery court at Charlotte against Jesse A. and Robert Brunson, claiming an equal share in three parts to be divided of the securities placed in Jesse A. Brunson's hands to be collected as above stated, charging that Doctor Brunson designed to give those securities to his surviving sons.

Jesse A. Brunson had not returned those securities in his inventory of Doctor Brunson's estate; but on filing his answer to Dortch's bill, he took the ground that they actually constituted a part of Doctor Brunson's estate and had not been given to his sons; and insisted that Dortch as administrator of Ashbell, was not entitled to any part of them, nor to any other portion of Doctor Brunson's estate without collating the advancements made to Ashbell. And he stated the transaction of the deposit of the securities in his hands by Doctor Brunson in the following terms:

That Doctor Brunson placed the claims in his hands, and directed him to collect them, and pay himself for his trouble and the expense of collecting them, observing—"You may retain one third, and divide the balance between Robert and Ashbell, and it will enable you to pay your debts;" that upon this he requested his father to give him his part of the notes, but Doctor Brunson replied that he preferred that Jesse should take the notes and collect them, and added—"If you do not like to pay the balance to Robert and Ashbell, after paying one third, pay it to me, and I'll give it to them." And he continued, exercise your own discretion in collecting the notes; but don't throw good money after bad, for some of the claims are not good. There's Shelby's note,—he's insolvent now, but he's young, and by holding it up, he may become good." As an evidence that the transaction was no gift, he further

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stated in his answer, that about a week after the delivery of the securities to him, Doctor Brunson directed him to exchange some of them with Cave Johnson for claims on Stewart county, which was done in part. And the answer continues—"Respondent never received the claims with any kind of instructions or understanding that his father intended to give up his control over them or his ownership. It was, according to his understanding, more a declaration of what he intended or wished to be done than any thing else. He made no assignment at all, and the business was conducted in his name."

On the 11th of April 1830, Jesse A. Brunson, before filing his answer to Dortch's bill, filed his own bill in the chancery court at Charlotte, against the children of Asabel Brunson the younger, and the widow and children of Ashbell Brunson and his administrator, Dortch, and against his brother Robert; praying that they might account with him as administrator of Doctor Brunson's estate, collate their advancements, &c. &c.

Answers were filed to this bill; and in that of Ashbell Brunson's representatives, they declined bringing their advancements into hotchpot, but claimed one third of the securities placed by Doctor Brunson in Jesse A. Brunson's hands as above stated.

In March 1832, Penelope, the widow of Doctor Brunson died intestate and Jesse A. Brunson was appointed her administrator in April following, whereupon he filed a supplemental bill to have her estate administered in the suits already instituted, which the court now order to be heard together.

Upon the supplemental bill, it became a question whether Doctor Brunson's widow, Penelope, was entitled, in the distribution of her husband's personalty, to share equally with the three distributees who collated their advancements; or was only entitled to a fifth of the estate exclusive of all advancements as well of those which were collated, as of that which was not?

For if she was entitled to a fourth, then Ashbell Brunson's distributees, who refused to collate the advancements made to him, would be entitled to the eighth of the whole of Doctor

Brunson's estate in addition to their advancements, instead of one twentieth of what remained after deducting the advancements.

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Testimony was taken to show that the deposite of the securities in the hands of Jesse A. Brunson had been treated both by him and his father as a gift; but as the court were satisfied from the statements of J. A. Brunson's answer, which are recited above, that this was the nature of the transaction, it is unnecessary to detail the testimony upon the point.

In 1834 Jesse A. Brunson died intestate, and his widow Louisa, was appointed his administrator as well as guardian of his children; and the causes having been revived, were heard at October term, 1838, by his Honor chancellor BROWN, who being of opinion that the deposite of the securities in the hands of Jesse A. Brunson in 1826, was a *gift* of these securities to the three surviving brothers; and being also of opinion that the widow of Doctor Brunson was only entitled to one fifth of the remainder of his estate after deducting the advancements, decreed upon both points accordingly.

From this decree the heirs of Asabel Brunson the younger, appealed in error.

F. B. FOGG, with whom was MEIGS, for the appellants, contended as to the deposite of the securities in the hands of Jesse A. Brunson, that it was not a gift, and he said

That in gifts *causa mortis*, the donor intends to give the money, not the note, therefore delivering the note is not sufficient, but it is said a delivery of a bond as *donatio causa mortis* is good. 2. Kent's Commentaries 352, 4. These gifts are not to be encouraged. A chose in action cannot be the subject of such a gift. *Tate vs Tate*, 2 Vesey Jr. 116; 3 Peere Williams 356; 12 Vesey 39; 1 Maddox Reports 176; 7 John 52; 1 Swanston 486; 1 P. Wms. 104; 1 Vez. Jr. 548; 2 Ves. Sen. 442; 7 Johnson 224; 1 and 2 Paige's Reports.

"A gift at law or in equity, says the Master of the Rolls, in 1 Swanston 491, supposes some act to pass the property: in donations *inter vivos* if the subject is capable of delivery; if a chose in action, a release or equivalent instru-

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ment; in either case, a *transfer* of the property, is required. An intention to give, is not a gift."

Chancellor Kent says, 2 vol. p. 354, 1st edition, Lecture 38, "Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. There exists the *locus penitentiae* so long as the gift is incomplete, and left imperfect in the mode of making it, and a court of equity will not interfere and give effect to a gift left inchoate and imperfect." The donor must irrevocably divest himself of a right to a thing and transfer it gratuitously to another, who accepts it, and the acceptance is necessary to the validity of the transfer. In page 355 he says, delivery in this as in every other case, must be according to the nature of the thing. The donor must part, not only with the possession, but with the *dominion* of the property. If the thing given be a chose in action, the law requires an *assignment*, or some equivalent instrument, and the transfer must be actually executed." According to Jesse Brunson's own statement, he being the person to whom the notes and bonds were delivered, his father never intended to part with his power and dominion over them. There was no transfer or assignment whatever.

2. The second question is as to interest. The administrator is liable to interest before the expiration of the two years when he receives money and employs it for his own benefit, which he did in this case. He alone can show how he employed the money, and whether it was necessary to retain it to pay debts.

3. The third question is, as to the advancements being brought in for the benefit of the widow. By the English law and construction of the statute of distributions, no benefit shall accrue to the widow from bringing in advancements to children. 3 Bacon's Ab. 77; *Ward vs. Lant*, Prec. Chan. 182, 184; *Kircudbright vs. Kircudbright*, 8 Vesey, 51. In North Carolina in Conference Reports and Taylor's Reports, a different decision was made upon the construction of the act of 1784. By that act she is entitled to share equally with all the children, and to have a child's part. Part of what? of the surplus personal estate of the intestate after paying debts and profits. Of course the statute does not

divest the child of any property which has been given to him. He may, if he pleases, keep it all. In this case one of them elects to do so, and that part given to that child was no part of the personal estate of the intestate.

Cook, for Jesse A. Brunson, said, 1. In the distribution of personal estate among the widow and children of the deceased, when advancements are to be brought into hotchpot, the advancements are to be valued at the date of the gift, and the testator's estate is to be estimated and valued at his death. If, then, one child has been advanced in money, or other valuable thing, as much as the shares of the children not advanced would be were the whole estate divided at the death, he cannot come in without bringing in the property advanced.

In this case Ashbell Brunson was so advanced in negroes, and cannot come in unless he brings those negroes in. This he will not do, as he would be greatly the loser thereby.

2. After the death of testator, Mrs. Brunson, his widow, received from the administrator very near her full share of the estate. For the purpose of ascertaining this we must ascertain the value of the estate at the time she received her property. If she received her share in value, she cannot come in for the after hire or increase of the remaining negroes. If she did not receive her full share, then she will be entitled to her aliquot share, or the balance coming to her, and her proportionable share of the increase and profits as that balance bears to the whole found. She cannot come in for an equal division of the increased value of the negroes and their hire without also bringing in the increased value that part received by her.

3. The wife is entitled under the act of 1784 to one fifth of the personal estate of which her husband died possessed. She is not bound to bring in any advancements made to her by her husband, nor has she any right to compel the children to bring into hotchpot any advancements made to them.

It is believed the act of 1784, c 22, § 8, 9, can receive no other construction. By the eighth section it is enacted, "If the husband die leaving no child, or not more than two children, the widow shall be entitled to one third of the per-

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sonal estate." What personal estate? Manifestly the personal estate of her husband. "If leaving more than two children, then the widow shall share equally with all the children, she being entitled to a child's part."

Suppose the case of no child, would the next of kin, or the widow, in that case, have to bring in their advancements before the one could take the one-third or the other two-thirds of the personal estate? That will hardly be contended. Suppose one child, would he have to bring in, and could he compel the widow to bring in her advancements.

There is nothing in the act to warrant such a construction. When the case is varied, and there are three children, what reason is there to suppose the legislature intended hotchpot in that case if not in the two former. It is said the act says, the widow shall share equally with the children, being entitled to a child's part. What is the meaning of shall share equally with all the children, that forces this construction? Shall be entitled to a child's part of what? As we contend, of the estate of her husband left at his death. If there are three children she is entitled to a fourth; if four, to a fifth; if five, to a sixth; if six, to a 7th, &c.

But it is said by this construction, she will not share equally with all. That when the children come into hotchpot, some will receive more than her. To this it may be answered, that should that be so, some one will receive just as much less so that her share will not in the least be affected by this operation. Where there are four children, they can in no case receive more or less than four-fifths of the estate of testator, left at his death. The previous advancements are only to settle equities among themselves, under the act of 1715. Were it not for that act, the children could not be brought into hotchpot. There is no act requiring or permitting the widow to come into hotchpot; she is not mentioned in the act of 1715, or any previous act. The subject of advancement is not mentioned in the act of 1784. By what authority, then, can she come in or be brought into hotchpot? The legislature in this act, in all its provisions, is directing and settling the rights of the wife and children to the estate of which the intestate dies seized without any

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reference to what he once had, either before or during the coverture. It is so in relation to the real estate, and there is nothing showing a different view in relation to the personal estate. Indeed, it appears manifest by the provisions and wording of the ninth section, that the legislature so considered the subject. By that section it is directed, that the same jury that lays off the dower in lands shall lay off the widow's share of the personal estate of which her husband died possessed, and to which she is entitled. Here the words of which her husband died possessed, and to which she is entitled, manifestly shows that the widow was only entitled to an equal share with the children, of the property of which her husband died possessed. How could a jury laying off dower settle all the difficult and complicated accounts and legal questions arising under the law of hotchpot. They could very easily count the number of children, and lay off the widow's dower, and her share of the personalty, that being as in this case, one-fifth, and leave the children to settle their equities among themselves; she then would emphatically share equally with all the children, and would have a child's part of the personal estate of which her husband died possessed.

The law of hotchpot has never been considered as applicable to the widow. At law, the wife cannot be advanced by the husband; for gifts to his wife are void. It is true, he can, through a trustee, give to her real or personal estate. When must the gift be made?—must it be during coverture or before or both?

The law certainly never has been understood or acted on in this state as now contended for. If the law is so, the wife, instead of taking a child's part of what her husband died possessed, will in many cases take all, and in almost every case take more than the children. She will be gainer by every advance made to the children of a former wife; made too before she had any connexion with the father. Suppose all the children fully advanced but one, then she will take half the estate, which would be more than she would be entitled to, if there were no children at all, for in that case she would only be entitled to one-third. Suppose

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them all advanced, then she would be entitled to the whole, thus placing her in a better situation than if there had been no child. Could the legislature mean such an absurdity? I am aware of the case determined by the court of Conference, reported in Taylor's old North Carolina Reports, a book of but little authority. The reasons there given for the decision are entirely unsatisfactory, and the case was badly argued. It proceeds upon the false supposition, that it was necessary to give this construction, in order to give the wife an equal share with all the children. The provisions and wording of the ninth section seem to have been entirely overlooked, as well in the argument as in the opinion of the court. The views now offered and the absurdities to which that construction would lead, was not presented to, or considered of, by the court.

3. Upon the question of interest, within two years. If all the available funds or cash be taken, and the amount paid the legatees, within the two years, be deducted, say \$3000 to Mrs. Brunson, \$1000 to Robert, and \$5000 to Ashbell, then make Jesse's advancement in the lifetime of his father, equal to the rest and not one dollar will be in his hands.

4. Jesse is entitled to compensation for collecting the gift notes; that was the agreement between him and his father when he received them, on his answer. He would be entitled to this without any special agreement.

Five hundred dollars is too small a compensation for managing the estate of his father and mother; it is entirely inadequate.

All the negroes of the estate were in possession of his mother. She received the hire, and whatever it is must be taken from her share.

6. Jesse is entitled to his counsel fees, which were rejected. Wms. on Exec.

BOYD and CAVE JOHNSON, for Ashbell Brunson's distributees, said—It is insisted that the delivery of the notes above specified, without assignment, is a good and valid gift.

In the case of *Canfield vs. Monger*, 12 John. 346, a note given to another to collect and apply the proceeds to the payment of a debt, was holden to be an equitable assignment,

and that trover could not be maintained; the same case is reviewed in *Wheeler vs. Wheeler*, 9 Cowen, 34, and sustained. It is also holden in the case of *Wells vs. Tucker*, 3 Binney; 366, that the delivery of a bond to a third person for the use of another, is a good gift to the donee.

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See also 1 Caine's Rep. 363. *Franklin Bank vs. Raymond*, 3 Wend. 69; *Pearl vs. Wells*, 6 Wendell, 291.

In the case of *Grangiac vs. Arden*, 10 John. 292, the delivery of a lottery ticket to an infant daughter, by writing her name on it, or after declaring on the part of the father that it was her's, held a good gift; the ticket drew a prize of \$5000, and the amount recovered in assumpsit.

See also *Heath vs. Hall*, 4 Taunt. 326; Chitty on Bills, 8 n. q. 1. The mere delivery of a chose in action upon a good or valuable consideration holden good. *Prescott vs. Hull*, 17 John. Rep. 292.

In the case of *Constant vs. Schuyler*, 1 Paige, 316, the delivery of a promissory note is holden a good *donatio mortis causa*. See also *Ranker vs. Guellin*, Chitty's Bills 3 (i) 85 (i); *Miller vs. Miller*, 3 P. Williams, 358; *Gardner vs. Parker*, 3 Mad. 184.

See Matthews on Executors, Law Library, 57; Toller, 234; gift of bond or bank notes good.

In England a distinction is taken in many cases between promissory notes under seal and not under seal—the delivery of the former holden good, and the latter not as a *donatio mortis causa*. It will be seen from an enumeration of the cases, that this is applicable alone to cases where the intestate gives his own note, and not the note of a third person. Testator's own note when under seal importing a valuable consideration, but when not under seal, the consideration may be enquired into, and if without a good and valuable consideration, it is a mere *nudum pactum*, it is not a gift but a mere promise to give. *Miller vs. Miller*, 1 P. Williams, 358; *Snodgrass vs. Bailey*, 3 Atk. 214; *Gardner vs. Parker*, 3 Mad. 184.

In the case of *Constant vs. Schuyler*, 1 Paige, the chancellor denies there is any reason for this distinction. And in

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the case of *Wright vs. Wright*, 1 Cowen, 578, testator's own note holden good as a *donatio mortis causa*.

Bills of exchange and promissory notes are considered in law goods and chattels for many purposes, and the right passes by delivery in the same way.

Under the British statute, making the fraudulent delivery of "goods and chattles" an act of bankruptcy, the fraudulent delivery of promissory notes or bills of exchange was holden an act of bankruptcy. *Cummins vs. Bailey*, 6 Bing. 371.

If a *feme sole* be possessed of notes or bills of exchange, and marry, the husband may sue in his own name without joining the wife. *McNeilage vs. Holloway*, 1 B. and A. 218. *Burton vs. Dees*, 4 Yer. 4.

But if the delivery of the notes to Jesse A. is not a gift in law, it was the creation of a trust in equity which Jesse accepted, and in part performed in the lifetime of Doctor Brunson, and which he cannot now refuse to carry into effect. 10 Yer. 273.

They further insisted that the chancery court erred in allowing the widow one-fifth instead of one-fourth.

One of the sons, Ashbell, being fully advanced, does not come into hotch pot; and there being three other children, and the widow, she should have had a fourth; and should also have had the benefit of the advancements made the children who came into hotch pot. See *William's Executors*, 948, 949.

The statute of 1784, ch. 22, sec. 8, intends to place the widow on a footing of equality with the children, and this can only be done by giving her the benefit of advancements. If a man die having nine children and widow, having had one hundred thousand dollars, and advanced eight of the children their full share \$10,000, and leaving for himself and wife, and younger child, \$20,000, the eight children being fully advanced, do not come into hotch pot, and yet, according to the construction contended for, the widow is only to have the one-tenth, and the balance to go to the other; or if they come into hotch pot, unless the advancements are included for the benefit of the widow, she will only get one thousand dollars, whilst the children each have over ten thousand. Such a con-

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struction of the statute in every case where the children are numerous, and any of them advanced, instead of making better provision for the widow, as the preamble shows was the design of the legislature, operates to her destruction. In the case now before the court, Jesse was advanced in the lifetime, \$4,800; Robert, 5,400; Ashbel's children, 4,500; Ashbell, 11,500; besides the gift notes; leaving, at the death, about \$12,000 in money, and in negroes, 5,100, and the court of chancery decrees:

That the widow should only have the one-fifth part of the balance of the estate, although Ashbell's heirs being fully advanced, claim no part. Whilst the children are all rich, the widow is left with comparatively nothing.

See Conference Reports, N. C. 361, where this construction of the statute is sustained.

The court also erred in directing interest to be computed at the end of two years, from administrator granted. The administrator received \$7,000 in money, and about \$5,000 in notes, besides the gift notes. The whole expenses of the administrator, including debts, was about \$715, yet the cash on hand is retained. The testimony shows that he took a portion of the notes, (New York notes returned in the inventory,) and got them changed at Dover. Jesse A. having been embarrassed greatly before the death of his father, built a mansion house, furnace, &c. as shown by the evidence, from whence it is inferred that he used the money.

REESE, J. delivered the opinion of the court.

The first question of importance which the record presents, February 2. is upon the alleged gift of Asabel Brunson, the elder, to Jesse A. Brunson, of the bonds and notes, for the benefit of himself, and his two surviving brothers. And upon this question two considerations arise. 1. Was the gift in fact made? 2. Did the delivery of the bonds and notes give to the donation validity in point of law?

1. As to the matter of fact we think that no doubt can well exist. The answer of Jesse A. Brunson, in effect admits the gift, although with some doubt and qualification. The conduct of Jesse A. Brunson strongly proves it, by bringing

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suit in the life time of the father upon one of the bonds, for his own use, by giving up one of the notes, and taking a new one payable to himself; by paying over to each of his brothers a portion of the proceeds of the notes during the life of the father, and especially by omitting all mention of the notes in the inventory returned by him as executor.

But the gift is abundantly proved by the statements of Jesse A. Brunson to various witnesses, both before and after the death of the father, and also by the declarations of the father in his life time, to several persons. It is well established as a fact, therefore, that Asabel Brunson, in his life time, gave the notes and bonds in question to Jesse A. Brunson, to be collected by him for the joint benefit of himself and his two brothers.

2. It remains for us to enquire whether the gift and delivery of the notes and bonds operates to vest a property in the money secured by them, and is a valid donation, *inter vivos*?

Upon this subject, in England and America, there have been some fluctuation and conflict of decision, arising almost exclusively in questions of donations *mortis causa*. One thing with regard to the matter was conclusively settled in England so early as the time of Lord Hardwicke; namely, that there might be a valid donation *mortis causa*, of a bond, by delivery. But it was then decided that this was not the case with regard to promissory notes and bills of exchange. It is not necessary to detail the reasoning of Lord Hardwicke, as to the grounds upon which the distinction proceeded. However satisfactory at the time, it became less and less so as the negotiability of notes increased, and as they became more and more nearly assimilated to money itself. Perhaps the distinction which now appears shadowy and merely technical, arose, in fact, from an anxiety to limit the number of cases, as much as possible, of donations *mortis causa*, because of the great danger of fraud and perjury in those cases.

In the case of *Rankin vs. Wegnelin*, at the Rolls, so late as 1832, where a husband in contemplation of death, delivered certain bills of exchange payable to his order, to his wife, saying, "take these for your own use and benefit," and he died within a fortnight of the delivery of the bills, without

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endorsing them, and the executor took them from the wife, and collected the money; the question was, whether they were subjects of a *donatio mortis causa*? and it was urged that a chose in action could not be so given. The Master of the Rolls said the contrary doctrine had been well established since the time of Lord Hardwicke's opposite decision; and he held that the executors were trustees for the wife, and he relied on 1 Bligh's Rep., New Series, 497; 1 Dow's Rep. N. S. 1; Chitty on Bills 3, note (i), 8 Ed. So also, in this country, in the case of *Constant vs. Schuyler*, 1 Paige's Rep. 318, the Chancellor of New York held that the promissory note of a third person, is the proper subject of a gift *causa mortis*. And referring to the distinction of Lord Hardwicke, he says, "Notwithstanding the attempts which have been made in England to distinguish between a promissory note and a bond, in relation to the validity of a gift of a chose in action, there cannot, in reason, be any difference. A gift of either is valid as a symbolical delivery of the debt on the note or bond, and all the delivery of which the subject is capable."

Without multiplying references to authorities on either side of the Atlantic, we may conclude that the law now is, that these choses in action constitute a proper subject of valid donation in view of death; and *a fortiori* of valid donations *inter vivos*.

3. There being three children, and the descendants of another in the present case, and one of the three having been so fully advanced in the life time of the intestate, as that he chooses not to come into account and contribution with the other children, the question arises, whether the widow is entitled to a fifth, or to a fourth of the personal estate; or, in other words, whether she has a right to insist that the advancements to the children shall be brought into contribution?

It is conceded that the widow in England has no such right under their statute of distributions, nor in this state, by the provisions of the acts of 1715 and 1766. But it is said to result here from the purview of the statute 1784, c. 22, § 8. The question is for the first time to be decided in this state, and there is but one decision in the state of North Carolina,

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upon the question, which was made by a portion of the court called the court of Conference, in the year 1801, *Duke vs. Duke*, Conf. Rep. 361. As that decision is one way, and the uniform action of our courts and our community is known to have been, for half a century, another way, we shall, for the present, consider the question as an open question.

And at the threshold, the consideration presents itself, that the doctrine of collation and contribution of advancements, in lands or in personalty, as among the children themselves, is of statutory creation; it is founded, as to personalty, upon the statute of 1766. The widow, it is conceded, is not, by the provisions of the statute, included within the scope of that principle. As to lands, it is founded upon the very statute in question, 1784, c. 22, and its operation is limited to children. If the widow have this right, therefore, it is not expressly and in terms given as it is to the children in both the instances referred to, but arises from construction and implication.

That a principle so peculiar in its character, and so pervading in its operation, and created in other instances by terms so full and explicit, should have been intentionally applied to the widow by words which create only an implication, it is difficult to believe.

The principle of contribution among the children is equality. This is not in all instances attainable, may be, and generally will be approximated. But the widow stands upon grounds peculiar and isolated—in some respects better than that occupied by the children, in some respects worse. For instance, in case of intestacy,—if there be no children, she gets only one-third of the estate; the balance would go even to distant relations of the husband. But if there be no wife, the child or children get all in case of intestacy. On the other hand, the children may be disinherited, they cannot claim against the will of the father. But the wife can claim against the will of the husband, and can compel the legatees, be they children or strangers, to contribute, *pro rata*, till her third or her child's part be made up. The husband may, by will, give his whole real and personal estate to the wife; the children cannot object; but if he devises it to them, his wife can ob-

ject to the extent and effect in the statute under consideration, mentioned.

These remarks are made to show, that the attitude and rights of the wife, and of the children, are so distinct and different under the statute, and, in general, that equality, as between them, cannot be said to have constituted the leading object of the statute. Thus, if the husband die leaving one child, that child shall have, in case of intestacy, two-thirds of the personal estate; the wife shall have one-third. The child so taking two-thirds may have been largely advanced. Yet it is conceded in the argument that this is not a case for contribution. The widow takes her one-third and no more. Again, if there be two children, they and the widow severally take a third; but these two children may have been largely advanced in the life of the father; yet here again it is conceded, that there is no just claim for contribution.

The wife is still entitled to her third of the personal estate at the time of the death.

But, says the statute, "If the husband shall die, leaving more than two children, then and in that case, such widow shall share equally with all the children, she being entitled to a child's part." Here, for the first time, it is insisted, comes forward the principle of contribution, by force of the words, "share equally" and "child's part."

If there be no child she gets but a third; if there be one child, and he largely advanced, still she gets but her third; if there be two children, and they be largely advanced, still she gets but her third; but if there be three children, and they largely advanced, then by the argument, she may get by, the principle of contribution, which here first arises, the whole personal estate; whereas the leading object of the provision seems to have been, that as the number of children increased, her interest should diminish, one-third being deemed too much where there might be three or more children.

That the phrase, "child's part," means only the aliquot portion of the wife according to the number of the children, may be proved in this manner. There are two cases put in this eighth section, where the wife can claim her third, or her child's part, according to circumstances. One is, where the

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husband dies intestate. That case we have considered. The other is, where he makes a will, but does not make her an adequate allowance, and she dissents. Suppose, in the latter case, the husband by his will, should make but a slight provision, or none at all, for his three children, and should bequeath the bulk of his personal property to collateral relatives, or to strangers, and the wife having dissented, should file her bill. To what would she be entitled? To a child's part, says the statute; and in the case supposed, there are three children, what would be her child's part? Why the legatees, who are strangers, would insist that she should have an actual child's part; that she should share equally with them, using her present argument. But she would reply, that as there were three children, she was entitled to one-fourth part of the personal estate; and we think she would reply correctly.

That we place the proper construction upon the eighth section of the act of 1784, c. 22, we think is made manifest by the provisions of the ninth section. That section having described the mode in which the widow shall sue for, and have assigned to her her dower, provides that the sheriff and jury, spoken off before, "shall also, allot and set off to such widow, such part or portion of the personal estate of which her husband died possessed, and to which, by this law, she shall be entitled; which part or portion shall be and enure to such widow," &c. This shows that the *corpus* of the estate, out of which she could claim her share, was the personal estate of which her husband died possessed. And the nature and character of the tribunal to whom the duty was assigned of making the allotment, excludes the idea that it could be any part of their province to take an account of advancements.

As to the decision in the conference court of North Carolina, it seems to have been the only one which has been made in either state upon the question. It is, indeed, incidentally referred to in a recent case in N. Carolina, 1 Dev. and Batt. 329, 330, without disapprobation. The case itself seems not to have been very fully investigated or considered. If, however, our courts and our community had adopted and acted upon its authority, we should have hesitated at the time to have laid down a different rule. But as so far from adopting

and acting on the rule laid down in that case, we know that the practical rule has been different, and conformable to the views set forth in this opinion, we are not disposed, by yielding to its authority, to change a practice under the statute, which we deem correct.

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2. *Annulled for constructive fraud, how assignee to account.* If an assignment embrace some effects which are liable to execution at law, and some that are not, and it be set aside for constructive fraud at the suit of a judgment creditor of the assignor, the assignee will account.

To the judgment creditor—

1. For such effects, as existing in specie, when the *fi. fa.* was issued, would, in the absence of the assignment, have been subject to its lien.

2. For the proceeds of such effects.

To all the creditors parties in the suit—

3. For all effects in his hands not subject to execution at law, as choses in action, money, stock, &c.

Exceptions—

4. He will be allowed to retain so much of the proceeds of the debtor's effects converted into cash, as will pay his own debts if a creditor; and he will also be allowed a credit for any *bona fide* debt of the assigning debtor paid by him as assignee or trustee before the complainant's lien attached: as also for all reasonable charges and commissions for care, and sale of effects, and collections. *Ibid.* 329, 331.

3. *Distinction between assignment and absolute sale of consumable articles.* An assignment of articles consumable in the using, to secure the payment of a debt, is fraudulent, *per se*, if the deed stipulate that the debtor shall retain the possession and use of them. But a reservation by the vendor, with the purchaser's consent, of the possession and use of articles absolutely sold, though they are consumable in the using, is only a badge of fraud. 3 Yerger 502; 4 Id. 541; 8 Id. 419. *Richmond vs. Crudup*, 581, 584.

ATTORMENT.

See LANDLORD AND TENANT.

AUTHENTICATION OF STATE RECORDS.

Constitution of U. S. art. 4, § 1, and act of Congress, 1790, c. 11—1 Story's Laws, 93; Gordon's Digest, art. 638,—as to mode of authenticating records of the States, and the *faith* and *credit* to be given them, as to defences to suits on, considered. *Estes vs. Kyle*, 34, 41, 43.

See CONSTITUTIONAL LAW.

BAILMENT.

1, *Slave.* What disposition of a father to a child is a bailment or a gift within the North Carolina act of 1806, Rev. c. 701, *McKisick vs. McKisick*, 427. *See SLAVE. GIFT.*

BAILMENT—Continued.

Same. Hirer's responsibility—changing service. A hirer of a slave for a specific purpose is responsible for all *damages* arising from employing the slave in a different service; as he is also, for a *loss* occurring while the slave is so employed, though the proximate cause of such loss was inevitable casualty. *Angus vs. Dickerson*, 459, 466, 470.

- 3, *Same, same, conversion.* It is a fraud upon the rights of the owner, and a conversion, to put a slave to a service entirely different from that for which he was hired. *Story, Bailments*, § 413. *Ibid.* 469.
- 4, *Same—general hiring.* In case of a general hiring, the hirer is only responsible for ordinary neglect. *Ibid.* 469.

BASTARD.

- 1, *Jurisdiction—filiation.* Questions of filiation are not jury causes, and the jurisdiction of them is, therefore, not taken from the county court by the act of 1835, c. 6, § 3, and c. 5, § 7. *Kirkpatrick vs. The State*, 124, 126.
- 2, *Same. Power of the court.* But it seems that the county court, if they saw fit, might have had the aid of a jury to try the issue, without such proceeding constituting an error for which the supreme court would reverse. *Ibid.* 126.
- 3, *Same. The issue is to the court.* *Goddard vs. The State*, 2 Yerger, 96, approved. It decided that the act of 1822, c. 29, meant to confer on the county court, without a jury, the power "to hear the proof and determine the matter," involved in the issue in bastardy causes; and meaning that, it was nevertheless constitutional. *The State vs. Costney*, 8 Yerger, 210, is not inconsistent with that decision. *Ibid.* 124, 126.
- 4, *Descent of their estates, and of parent's to them.* * See note to *Guion vs. Burton*, 573.
- 5, Whether the father of one legitimated by a private law, is his heir? *Ibid.*

BILLS OF EXCEPTIONS.

- 1 *Defective statement of evidence.* If it does not appear in the bill of exceptions, that *all the evidence* submitted to the jury is stated therein, the court of errors will presume that there was evidence to justify the verdict of the jury. This presumption will not be made if the bill state that it contains all the *material evidence*. *Trott vs. West*, 153, 169.
See EVIDENCE.
2. *Judgment—presumption in favor of—how removed.* The judgment of an inferior jurisdiction will not be reversed because the record does not show the evidence upon which it was founded. It will be presumed that there was sufficient evidence to support it. The want of evidence to sustain the judgment must be shown by bill of exceptions. *Union Bank vs. Lowe*, 225, 229, 231.
3. *A Note*, though filed by the justice, is not part of the record of the court above, till made so by bill of exceptions. *Ibid.* 229.
4. "Note, promissory note"—in bills of exceptions, means an unsealed security. *Craighead vs. The Bank*, 199,

BILLS OF EXCHANGE AND PROMISSORY NOTE.

1. *Notice of dishonor. Ignorance of place of residence.* Though the holder of a negotiable security know the *residence* of the endorser, yet he may not know the post office nearest thereto; and in such case, notice of the protest directed to the post office, which, after diligent inquiry, is supposed to be nearest, will bind the endorser. *Marsh vs. Barr*, 69, 71.
2. *What is diligent enquiry?* Enquiry made of such persons where the

BILLS OF EXCHANGE AND PROMISSORY NOTES—Continued.

- security is made payable, as may reasonably be supposed capable of giving the desired information, is diligent enquiry in legal contemplation. *Ibid.* 70, 71.
2. *Cases upon this subject approved.* *Davis vs. Williams*, Peck, 191; *Dunlap vs. Thompson*, 5 Yerger, 67; *Nichol vs. Bate*, 7 Yerger, 305. *Ibid.* 71.
 4. *Defence to action on. Fraud. Want, or insufficiency of consideration. Injunction.* Collection of one given to a machinist for a worthless machine, whether he knew its quality or not, will be restrained by injunction. But not in the hands of a *bona fide* assignee. *Donelson vs. Young*, 156, 157. So if obtained by fraud or deceit. Note 158, *Ibid.* Chitty on Bills, 119, 8th Am. Ed. But collection of one given for price of land will not be enjoined at the suit of the purchaser who has not been disturbed in the possession, though the vendor had no title, or his title was incumbered. *Meadows vs. Hopkins*, 181, 183, 186.
 5. *Sued on before a justice, how made part of the record of the circuit court on appeal from that to the supreme court.* If a note be sued on before a justice of the peace, and be sent to the circuit court by him on appeal from his judgment, with the other papers in the cause, and an appeal taken from the circuit to the supreme court, the note is not part of the record of the circuit court, unless made so by bill of exceptions. *Union Bank vs. Lowe*, 225, 229.

See BILL OF EXCEPTIONS.

6. *Indorsers, contract between for one to take the shoes of another.* The force of an undertaking by one indorser "to take the shoes of the other as regards the endorsement," for a certain sum, is not to pay that sum in discharge of the liability, but to be liable instead of the party whose place is assumed. *Nashville Bank vs. Grundy & Hays*, 256, 260, 261.

BOND.

1. *Indemnity bond, injunction against.* Equity will enjoin the enforcing of a bond of indemnity unless the demand against which it was given has been or is about to be enforced. *Molloy vs. Elam*, 590, 594, 595.
2. *Same—assets or not.* *Ibid.* See Executor and Administrator, 3, 4.
3. *Same—devastavit or not to compound.* *Ibid.*
See EXECUTOR AND ADMINISTRATOR, 3, 4.
4. *Bond for title—assigned.* If a title bond be assigned by the obligee, and the assignee sue the obligor in equity for a specific performance, making the obligee a party, the obligor cannot resist a decree on the ground that no consideration passed for the assignment,—the bill being taken for confessed as to the obligee. *Koen vs. White's Heirs*, 358, 361, 363.
5. *Appeal Bond.* Recitals in the bond given for the prosecution of an appeal from a justice, will suffice to amend the justice's record by, if he omit to enter the prayer and grant of appeal. *Lawler vs. Howard*, 15, 16. See AMENDMENT.
5. *Delivery Bond. Liability of obligor, breach by legal constraint.* An obligor cannot be held responsible for a breach of the condition of his bond, caused by legal constraint.
7. *Same. Apportionment of damages on breach of.* Under the act of 1831, c. 25, which embraces delivery bonds taken after its passage, though founded upon executions issued before, if several writs of *fi. fa.* be levied on the same property, the obligors in a bond executed to the plaintiffs in one of them, conditioned to deliver the whole property, will be bound to deliver only so much of it as will be of value sufficient to satisfy the proportion of the execution of the obligees, to which they would be enti-

BOND—C *continued.*

tled against the plaintiffs in the other executions. *Kercheval vs. Herney*, 404, 411, 412.

BOUNDARIES.

1. *Public survey omitted or effaced, private survey, or re-marking lawful and estops.* If granted land, not originally marked by the surveyor,—or whose marks have become obliterated or obscure, be afterwards marked, or re-marked, by the owner of the whole, or *part*, in good faith, and in reasonable conformity with the calls of the patent;—such private marking or re-marking operates as an estoppel on the owner, the state, and subsequent parties,—precluding the owner from claiming land *not* included by the newly marked or re-marked lines, and the state from claiming that which is included thereby. *Riggs & Pritchard vs. Park & his lessee*, 43, 48, 51.
2. *Same.* What marking or re-marking is *bona fide*, and in reasonable conformity with the calls of the patent, is a question of fact, depending on the circumstances of each case. *Id.* 50.
3. *Processioning—surveyor's duty—estoppel construction of 1806, c. 1, § 21.* If a proprietor cause his land to be processioned pursuant to the act of 1806, he is estopped from claiming otherwise than according to the processioning. *Whiteside vs. Singleton*, 207, 217, 225.
But that act does not authorise the public surveyor to procession a man's land without his consent. He is only made the agent to survey and mark at the request of the owner, in reasonable conformity with the calls of the grant. And if he refuse so to make the survey, the owner may put a stop to the processioning; and if, notwithstanding the owner's dissent, he proceed to complete the survey, according to his own views, it is binding on no one. *Id.* 219, 220.
4. *Same. Acquiescence. Quere*, what acquiescence in a processioning thus made by the surveyor, will bind the proprietor? *Ibid.* 220, 221, 222.
5. *Re-marking, principle of the estoppel of,—whether it binds feme covert.* Where the original boundaries of private possessions have been destroyed, or are unknown, or not well ascertained,—a survey made by the owner in reasonable conformity with his title deeds or papers, is held to be an ascertainment of the very land owned by him,—and to conclude him upon grounds of public policy, and for the security and repose of others. *Quere*, whether the reason of the doctrine applies to *femes covert*? *Yarborough vs. Abernathy*, 413, 418, 420.
6. *Ignorance of the true time necessary to give effect to re-marking.* If the parties know where the true line is, and by agreement make another,—this would be a parol transfer of land, and would be void by the statute of frauds. *Ibid.* 420.

CARRIER.

1. *Conveyance of goods—liability, limitations of.* The liability of a common carrier cannot be limited by secret instructions given to his general agent. See *Agent and Principal, Walker vs. Skipwith*, 502, 507, 509.
2. *Same. Same. Stage proprietor.* When a stage proprietor has habitually carried in his coaches persons and baggage, or packages, the regulations of his line and instructions to his agents—not to receive goods to be carried, except as the baggage of passengers, or in the care of passengers, but at the risk of the owner, or of the person sending them,—will not limit his liability for the goods received by his agents, unless the owner or his agent was notified of the rule or instructions at the

CARRIER—Continued

time of the receipt of the goods. *Ibid*, 507, 509. Harrison's Digest, 555, 6-7.

CASE, ACTION OF.

1. *Malicious arrest. Malice.* Cases and principles in the civil and common law. Note to *Dodge vs. Brittain*, 87.
2. *Malicious criminal proceedings. Malice and want of probable cause must concur.* If an innocent man be prosecuted for a felony, he cannot maintain the action of malicious prosecution, if there is probable cause for preferring the charge. And it would be error so to charge the jury as to lead them to the inference that in the court's opinion the plaintiff was entitled to a verdict unless guilty: *Ibid*, 85, 86. Harrison's Digest, 560, 563, 566.
3. *Same. Evidence in.* The *onus* of proving want of probable cause lies on the acquitted defendant. *Ibid*, note, 87.
4. *Probable cause, question of fact and law.* (?) *Ibid*, note, 87.
5. *Misfeasance.* The performance in an improper manner, place, or time, of an act which it was a party's duty, contract, or right to do, is a misfeasance. Chitty's General Practice, 9. *Childress vs. Yourie*, 561, 563, 564.
6. *Same. Militia drill.* To go through the exercises of the militia drill in the public squares and business resorts of towns and villages is a misfeasance. *Ibid*, 563, 564.
7. *Same. Same. Consequential damages.* The officer, under whose command the exercises of the militia drill is performed in the business resorts of towns, is responsible for consequential damages; as if a team hitched to a wagon and standing in the usual resorts of business—runaway, whereby one of the horses is killed, the captain is responsible for his value. *Ibid*, 563, 564. *Principles and cases*, note, 564.

CASES.

1. *Approved.* Bills of exchange, and notice of dishonor, 68, 71.
2. Form of grand jury's finding, 82, 83.
3. Assignment to secure debts, 329, 330.
1. *Collected.* Executors and administrators, limitation of actions against. Note, 75.
2. Proof by *subscribing* witnesses, or by secondary evidence. Note, 97, 98.
3. On partial invalidity of entry and grant, 102, 105.
4. Vendor's lien on sale of chattels. Note, 236.
5. On descents. Note, 572, 573.

CERTIORARI.

On Diminution. *Certiorari* awarded on diminution suggested after judgment rendered in the supreme court,—the suggestion being supported by a copy of the record from the court below showing the diminution. *Trott vs. West*, 163, 167, 168.

CESSION OF ACTIONS.

Texts of the civil law relating to, translated. Note to *Scanland vs. Settle*, 173, 174, 175.

CHALLENGE.

Of juror *propter affectum*, loose expressions of opinion as to person's guilt, not a cause of. *Houston vs. The State*, 262, 264.
See CRIMINAL LAW, 26.

CHAMPERTY.

1. *Contract to divide recovery with attorney or other person prohibited by act of 1821, c 66.* An agreement by a plaintiff in a pending suit to give an agent, whether his attorney at law or "other person," for conducting the suit, a part of his recovery, is champertous under the act of 1821; and on the fact appearing, in either of the ways pointed out in the law, the suit must be dismissed. *Weedon vs. Wallace*, 286, 296, 299.
2. *Construction of the phraseology of the law.* The words, "other person," employed in the prohibitory clause, was not dropt in the clause providing for the dismissal of the suit, and prescribing the method of proceeding, with the design to confine the operation of the law to attorneys, but was the result of the negligence of the draftsman. *Ibid*, 297, 298, 299.
3. *Dower, release of to heirs out of possession, whether champertous.* If a widow, to whom dower has not been assigned, release the right to the heirs not in possession; such release seems not within the purview of the champerty act; for it does not invest the heirs with the right of entry, and can, perhaps, operate only by way of estoppel. *Ross vs. Blair*, 525, 545.
- Same. Whether acknowledging such release after champerty act was passed is champertous?* If such release had not been duly acknowledged to pass the widow's interest before the champerty act, the acknowledgement after its passage is not champertous, unless the transaction was so in its inception. *Ibid*, 525, 544.
5. *Pretended right.* A sale by one out of possession, of land adversely held, is void for all purposes. It is neither good as against the adverse possession or title, nor as between the parties themselves; so that covenant cannot be maintained on the clause of warranty in the vendor's deed. *Williams vs. Hogan*, 187, 139.

CHANCERY.

ACCOUNT.

1. *Money paid on consideration which fails.* If a machinist sell a worthless machine for a good one, he will be compelled in equity to account for any part of the purchase money paid him, or this *bona fide* assignee by the purchaser. *Donelson vs. Young & Clements*, 155, 157, 158. *Receipt no bar to, when.* A receipt obtained from a ward by a guardian, acknowledging satisfaction of all demands against him, though given after the majority of the ward, will be no bar to the guardian's accounting in equity with the ward. *McCullom vs. Smith*, 342, 352, 357. See *Receipt*.

AGREEMENT.

3. *Construction, specific execution.* Agreements will be interpreted and specifically executed according to the prevailing intent of the parties. *Harper vs. Lindsey*, 310, 314, 316.
4. *Same. Rule of interpretation.* The general and superior object cannot be defeated by a less general and inferior direction; and, in general, the higher prevails over the lower, the principal over the specific direction. *Ibid*, note, 316. *Vid. Interpretation*.
5. *Same. Specific performance—title bond assigned, want of consideration for assignment.* If a title bond be assigned by the obligee, and the assignee sue the obligor in equity for a specific performance, making the obligee a party, the obligor cannot resist a decree on the ground that no consideration passed for the assignment,—the bill being taken for confessed as to the obligee. *Koen vs. White*, 358, 361, 363.
6. *Same. Same.* Lapse of time is a defence against a bill for a specific performance, when there is something to be done by the party asking

CHANCERY—Continued.

- for it, constituting a condition precedent, which he has deferred till, by the efflux of time, a material change of circumstances has been produced. It is no defence where two persons make a joint purchase of land, and a title bond is taken to one of them, who gives the other his bond for half of the land so soon as a legal title shall be procured; for in such case the obligee has nothing to do, previously to his being invested with a right of performance. *Ibid*, 361, 363.
7. *Same. Same. Statute of frauds. Award.* A verbal agreement to receive real estate in discharge of a debt, will not be taken out of the statute of frauds by a submission to referees of the question—at what price it should be received—though the referees fix the price in writing under seal in the shape of an account. *Rice vs. Rawlings*, 496, 499, 502.
 8. *Same. Same. Moral constraint, how it affects agreement.* If a creditor, having executed a mortgage or deed of trust of certain town lots, to secure the payment of a debt, refuse to acknowledge the execution of the deed so as to admit it to registration, and thereby extract from the creditor an agreement to receive the lots in payment, and a submission to referees of the question whether the creditor should receive the lots in payment at a price to be fixed by them, and an award be made accordingly,—such agreement and award will not be specifically executed in chancery, because of the moral constraint under which the party acted in making the agreement and submission, and the violation of good faith whereby they were obtained. *Ibid*, 499, 502.
 9. *Same. Same. Machinery which fails to answer its purpose.* The specific execution of an agreement for the construction of machinery for a certain purpose, will not be decreed at the suit of the undertaker or his assignee, if the machinery fail to answer the purpose of its construction, though the party, on whose premises, and for whose use the work was done, take possession of the premises. To entitle the undertaker to a specific execution in such case, i. e., to a decree for the stipulated compensation for his labor, the party for whom the work was done, must take possession of, use, and occupy the works as his own, and for the end for which they were designed. *Pearl vs. Nashville*, 597, 603, 606.

ASSIGNMENT IN TRUST FOR CREDITORS.

What stipulation in will vitiate. *Peacock vs. Tompkins. Vid. Assignment in Trust for creditor's.*

DEBTOR AND CREDITOR.

10. *Creditors' claims, effect of them on wife's right to alimony.* A husband, who is sued for a divorce and alimony, cannot resist a decree, because his creditors may be affected by it; nor, in ascertaining the alimony, will the courts take an account of his debts. *Chunn vs. Chunn*, 131, 133, 137.
11. *Judgment—execution—nulla bona.* If an accommodation endorser take an indemnity from his principal, the creditor cannot reach the property which constitutes the indemnity, till there shall be had a judgment at law against the endorser, and execution be returned *nulla bona*. *Nashville Bank vs. Grundy & Hays*, 256, 261.
12. *How it interferes in favor of creditors.* The jurisdiction of chancery, under the statute against fraudulent conveyance—1801 c 25, § 2, being ancillary, namely, to remove impediments to executions at law, will be exercised only, where the impediment to be removed, affects things which might be reached by execution but for the impediment: never

CHANCERY—Continued.

DEBTOR AND CREDITOR—Continued.

in any case where the property sought to be made liable, in equity, could not be reached at law, even though no obstruction existed. *Erwin vs. Cantrell*, 364, 373, 377.

13. *Money, stock, choses in action of debtor not liable to creditors when.* The statute of frauds avoids every gift, &c. of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, made of fraud, &c.; and by construction, it embraces voluntary gifts, made by embarrassed men, though without intentional fraud, of lands, &c.; but not a gift of money, stock, choses in action, &c., so made; nor does the donee, by force of such gift and the statute, become debtor to the donor's creditor. *Ibid*, 373, 377.
14. *Money, stock, &c. made liable by act of 1832, c. 11.* There was no jurisdiction in chancery to subject a debtor's money, stock, choses in action, &c. to the satisfaction of judgments against him, whether in his own hands, or in those of his voluntary donee, till the act of 1832, which was produced by the doctrine held in the case of *Erwin vs. Oldham*, 6 Yer. 185. *Ibid*. 376.

DEED.

15. *When cancelled for fraud or surprise or not.* To set aside a *feme covert's* deed of her land on the ground of surprise in her privy examination, whereby she was induced to acknowledge her signing, &c. unadvisedly and improvidently, the proof should be clear, credible and satisfactory, especially after the lapse of twenty years. *Montgomery vs. Hobson*, 437, 456, 458.
16. *Clerk and Master's.* *Quære*, whether, since the act of 1801; c. 6, § 43, the mere direction in a decree to the clerk and master to make a deed, and his deed made in conformity thereto, will divest the title out of the person against whom the decree is made, and vest it in the purchaser at the master's sale? *Claiborne vs. Crockett*, 607, 611.

FRAUD.

17. *False affirmation on sale of a chattel.* A machinist, in selling a worthless machine for a good one, is guilty of fraud, whether aware or ignorant of the defect. *Donelson vs. Young and Clements*, 155, 157, and note, 157, 158.
18. *How the buyer is protected.* In such case, equity will enjoin the seller from collecting a negotiable security executed for the price of the machine, and compel him to account for any part of the purchase money paid him or his *bona fide* assignee. See 1 M. and S. 525, 526, 527.—*Ibid*. 157.
19. *Assignee.* But an assignee of such security without notice express or implied, of the fraud, will not be enjoined from collecting it. *Ibid*. 157.

See ASSIGNMENT IN TRUST FOR CREDITORS.

GUARDIAN AND WARD.

20. *Purchase with ward's money.* Property purchased by a guardian, in his own name, with his ward's money, stands charged with the same trust as did the money; and the ward, on coming of age, may, at his option, take the money or the property; and if, with full knowledge of the facts and of his rights, he elects the money, the property discharged of the trust vests in the guardian absolutely. *Caplinger vs. Stokes*, 175, 179, 180.
21. *Settlement between, effect of on property purchased with ward's money.* A settlement between guardian and ward, after the ward's majority,

CHANCERY—*Continued.*

GUARDIAN AND WARD—*Continued.*

determines the trust; and the time of prescription is counted from the date of the settlement, so as to perfect the guardian's title to property purchased with the ward's money, and, on the settlement assigned to, and thenceforward held and claimed by the guardian as his own. *Ibid.* 175, 179, 180.

HUSBAND AND WIFE.

22. *Conveyance in fraud of marital right.* A disposition made by a *feme sole* of her property after a contract of marriage, and before its solemnization, will be fraudulent as against the husband, who has been kept ignorant of the transaction. 2 P. W. 674; 2 Bro. C. C. 345; 1 Ves. jr. 22; 2 Cox, 28; 1 Cond. Eng. Ch. R. 188. *Jordan vs. Black*, 142, 151, 155.
23. *Same. Exceptions.* This rule is perhaps without exceptions, so far as, by implication, it denies the husband the power to disturb a disposition of which he was informed before the marriage. But so far as it affirms his power to set aside a disposition concealed from, or unknown to him, ~~it~~ admits, it seems, of two classes of exceptions—1, founded on the meritorious objects of the conveyance—2, on the husband's situation as to pecuniary means. 7 Cond. Eng. Ch. R. 194, 195. *Ibid.* 148.
24. *Conveyance of ~~feme's~~ slaves to a trustee.* If a *feme sole*, between the contract and solemnization of an intended marriage, convey her slaves to a trustee to emancipate them at her death, and the intended husband be informed of the conveyance before the solemnization, the court, without inquiring whether the objects of the conveyance were meritorious, and without laying any stress on his pecuniary situation, would not entertain the husband's bill to set aside the conveyance. *Ibid.* 142, 148.
25. *Effect of such conveyance.* Such conveyance vests the trustee with the legal title, and the *feme* with an equitable life estate in the slaves, and a sale of them by the husband is equally an injury to both interests.—*Ibid.* 148.
See Johnson's Digest, Chancery, No. 824, *et seq.*; Harrison's Digest, page 1238.
26. *Descent in Louisiana among intestate's children in general, and when some or one of them is a feme covert, and non resident.* By the laws of Louisiana, all the legitimate children of an intestate, "participate to his succession" by equal shares. Code of 1808, B. 3, Tit. 1, c. 2, § 2, art. 27. If one of these children be a married woman, her share of the immovables of the succession vests in her as paraphernal property; and she holds it independently of her husband; and she is entitled to the administration and enjoyment thereof; Civil Code, La. p. 331, though she be domiciled in Tennessee with her husband. But her husband is entitled to the movables wherever situated as her administrator in Tennessee. *McCollum vs. Smith*, 342, 352, 357.
27. *Acquisitions after the marriage, change of domicil.* The law of the actual domicil of the husband and wife governs as to movable property acquired after a change of residence; and as to all immovable property, the law of the place where it is situated. Story's Conf. § 187. *Ibid.* 352, 355.
28. *Dower, What is a bar of—testamentary provision—election*, 1784, c. 22, § 8. At common law a widow was not put to her election between a testamentary provision and her dower, unless such provision was made expressly, or by necessary implication, in lieu, or satisfaction of dower. But by the act of 1784, any provision for the wife in the husband's will, either of real or personal estate, puts her to her election, which must be

CHANCERY—*Continued.*HUSBAND AND WIFE—*Continued.*

- made within six months after the probate of the will, or she will be bound by its provisions. *Reid vs. Campbell*, 378, 385, 389.
29. "*Wife's Equity*." It is a well established, equitable right of a wife, known by the name of the "wife's equity"—to have settled upon her and her children, a suitable provision out of her personal estate in the hands of a trustee; as, for example, in those of an executor or administrator, 5 Johnson's Ch. R. 464. *Dearin vs. Fitzpatrick*, 551, 559, 560. (Johnson's Digest, Chancery, No. 835 *et seq.*)
30. *How enforced.* It will be enforced by decreeing the provision; 1—incidentally, when the husband or his assignee is asking the aid of a court of equity to reduce her property into possession; 2—directly, at the suit of the wife, or of her trustee, praying for the provision; 3—in case the trustee is willing, or designs to pay or deliver the property to the husband or his assignee without suit, all of them will be enjoined, at the suit of the wife, from changing the possession until provision made.—
31. *Reduced into possession.* But no case has gone so far as to decree the provision after the husband or his assignee has reduced the property into possession. *Ibid.* 559, 560.
32. *Divorce a mensa—alimony.* Upon a divorce *a mensa et thoro*, the marriage is allowed to have been valid, and to have invested the husband with the wife's property: and, therefore, the practice is not to decree the wife absolutely a part of the husband's real and personal estate, but only to allot her some portion of his *income* for her support, securing the payment, if necessary, by charging it upon his estate. *Chunn vs. Chunn*, 131, 133, 137.
33. *Divorce a vinculo, decree thereupon*—1799, c. 19, *construed*. But upon a divorce *a vinculo*, the marriage is adjudged void *ab initio*, and the title to the lady's property remaining, therefore, unaffected by it, the possession is restored to her. And the same rule is to be observed in decreeing a divorce under the act of 1799, c. 19, though it allows a divorce *a vinculo* for supervenient causes. *Ibid.* 183 to 187.
34. *Husband's debts no impediment to alimony.* A husband who is sued for a divorce and alimony, cannot resist a decree, because his creditors may be affected by it: nor in ascertaining the alimony, will the court take an account of his debts. *Ibid.* 136, 137.
35. *Deed of feme covert.* See DEED *ante* 15.

INJUNCTION.

36. *Against indemnity bond.* Equity will enjoin the enforcing of a bond of indemnity, unless the demand against which it was given, has been, or is about to be enforced. *Molloy vs. Elam*, 590, 595.
- See FRAUD.

JURISDICTION.

37. Ancillary, *ante*, 12, 13, 14.
38. *When judgment and execution and nulla bona necessary thereto*, *ante* 11.

LIEN.

39. *Of vendor of slave how enforced.* If a purchaser of a slave at a fixed price, to be paid on a day certain, but "*until paid, the title to remain in the seller*," convey the slave to a trustee to secure a previous creditor, the trustee takes him subject to the seller's lien, which will be enforced in equity, upon the seller's bill against the purchaser from him, his creditor and trustee, by a decree, that they pay the price at a short day,—else that the sale be rescinded, and the slave redelivered. *Gambing vs. Read*, 281, 284, 286.

CHANCERY—*Continued.*

LEGACIES.

40. *Who takes—posthumous grand child.* The residuary clause—"all the rest of my estate, real and personal, to be equally divided between my grandchildren"—includes a posthumous grandchild, who was in *ventre matris* at the testator's death. 1 Roper on Legacies, c. 2, § 1, subsection, 3. *Smart vs. King*, 149, 151, 153.
41. *Vesting of favored in law, and why.* The vesting of legacies is favored in law. Generally, because the law will not intend that a testator means to die partially *intestate*. Especially, of those to children, on the presumption that the testator naturally desires their families to succeed to their interests:—and of those to others, because the tying up of property is inconvenient to the legatees, and against the interest of society. *Underwood vs. Dismukes*, 299, 306, 310. *Johnson's Digest*, Chancery 1192, *et seq.*
42. *Indicia of their being vested.* Giving the intermediate interest of a pecuniary legacy is so clear an index of intent to vest the property, as to overcome the strongest formal and verbal connection of the estate with the time of payment. So where the testator's *whole real and personal estate* is vested in trustees, to be used for the support and education of his family till a specified time, and then to be equally divided amongst his children and their heirs,—the children have, in the *profits*, a vested right of present common enjoyment, and in the *corpus* of the estate, a vested right of future several enjoyment. *Ibid.* 299, 306, 310.

LOTTERY.

43. *Sale of past and future drawings.* A sale by the grantees of what had been made, and of what should be made by drawing a lottery, in consideration that the purchasers do the thing for which the lottery was authorised, will not be enforced in a court of equity by a decree that the grantees draw the lottery, though the purchaser execute the contract on his part. The parties will be left to enforce their rights at law, or to abandon them, as they may choose. *Bass vs. the Mayor of Nashville*, 421, 425, 427.

MORTGAGE.

44. *Relation of mortgagor and mortgagee. Equity of Redemption. Statute of Limitations.* Even in case of a *direct* trust, and in a suit between trustee and beneficiary, the statute of limitations may be a bar to the claim of the latter. But the relation of the mortgagor and mortgagee is not that of trustee and beneficiary. It stands upon grounds peculiar to itself. The mortgagor has the right of possession, and it is, for himself from the first, but the mortgagor's equity of redemption does not depend upon that possession, and cannot be affected by it, or by the continuance of it under whatever circumstances or pretensions short of the time when a presumption of right will arise. But if the mortgagee sell the property, the purchaser, though at the time aware of the equity of redemption, will be protected by the statute; for though notice of the equity fixes him with a trust for the mortgagor, it is not direct but implied; and to enforce that species of trust, the beneficiary must sue within the time of limitation, for in such case the purchaser's possession is for himself; and his duty to the mortgagor does not arise out of the transaction whereby he acquired the possession, but is implied from the notice of his vendor's duty. *Wood vs. Jones*, 513, 516, 518.

PRACTICE.

45. *Pro confesso, effect of agreement to take testimony after, as if answer had*

CHANCERY—Continued.

PRACTICE—Continued.

- *been filed.* If after a bill for an account has been taken for confessed, it be agreed that it may be referred to the Clerk and Master to take an account, and that the defendant may prove before him, by competent testimony, any matter of defence to the bill in the same manner and to the same effect, as if an answer had been filed relying on such matter of defence, the defendant is not confined to proof adapted merely to limit his responsibility; but may adduce proof to the equity of the bill, and to show that he is not accountable at all. *Pearl vs. Nashville*, 597, 603, 604.
- 46. *Writs of error and supersedeas operate from fiat.* Under the act of 1811, c. 72, § 12, a cause determined in the chancery court is in the supreme court from the date of the judge's fiat for writs of error and supersedeas, although neither of them is served upon the Clerk and Master of the chancery court. *St. 3 James 1, c. 8; Sampson vs. Brown*, 2 East, 439. *Claiborne vs. Crockett*, 607, 609, 611.
- 47. *Effect of fiat on proceedings below after it.* A sale of land made by a Clerk and Master of the chancery court, under a decree of that court, after the allowance of a writ of error to, and supersedeas of the decree, is without authority and void. *Ibid.* 609, 611.
- 48. *Deed of Clerk and Master made under direction of decree.* Ante, 16.
- 49. *Sale.* See that title in this Index.

TRUST.

- Between guardian and ward—purchase with ward's money. Ante, 20, 21.
- 51. *By implication or operation of law—intent.* The fiduciary character cannot be superinduced upon property by implication or operation of law, unless the intent of the parties to invest it with that quality be deducible from the nature of the transaction. *Nashville Bank vs. Grady & Hays*, 256, 260, 261.
- 52. *Fund placed by one endorser in another's hands on the agreement of the latter to indemnify the former, not held in trust for holder of the paper.* If two persons be liable as accommodation endorers of a bank debtor on several notes, and one of them stipulates "to take the shoes of the other as regards the endorsements," for a specific consideration which is paid him, and the bank be defeated of its remedy against the endorser on one of the notes, whereby there arises a surplus of the fund placed in the hands of the indemnifier; the bank has no equitable right, title or interest in the surplus; and it does not stand charged with a trust in the indemnifier's hands; because the force of a covenant to take the shoes of another, for a certain sum, is not to pay the sum in discharge of the liability, but to be liable instead of the party whose place is assumed, should he be made liable. The rule is the same if a stranger, and not co-endorser assume the responsibility. *Ibid.* 260, 261.
- 53. *How created—resulting or implied.* An unsealed written acknowledgment or memorandum by a party clothed with the legal title of land, that another is interested in it a certain number of acres, will not raise a trust to convey the quantity specified, without proof of a consideration paid to the party making the acknowledgment or memorandum. A trust cannot be implied except upon a consideration proved. *Thompson vs. Branch*, 390, 393, 394.
- 54. *Direct—implied—when barred by the statute of limitations.* Ante, 44.
- 55. *Vendor and Purchaser.* The collection of a promissory note given for the price of land sold, will not be enjoined at the suit of the purchaser, because the vendor has no title, or his title is encumbered, if the purchaser has not been evicted. *Meadows vs. Hopkins*, 181.

See BILL OF EXCHANGE AND PROMISSORY NOTE.

See SALE. VENDOR AND PURCHASER.

CONDITION.

Precedent when payment is, in sales of goods. *Gambling vs. Reed*, 281, 284, 235. See *Sale*.

CONFLICT OF LAWS.

1. *Pleas to suits on state judgments—Limitations.* The statute of limitations of the state in whose courts a suit is prosecuted, must prevail in all actions. The general language in *Mills vs. Duryee*, 7 Cranch, 481, and *Hampton vs. McConnell*, 3 Wheaton, 434,—“that whatever pleas would be good to a suit brought upon a judgment in the state where it was originally rendered, and none others, can be pleaded in any other court in the United States”—is to be understood of pleas affecting the validity and conclusive effect of judgments as evidence,—not of pleas affecting only the remedy. *Estes vs. Kyle*, 34, 41, 43.
2. *Power of state over property within it—slaves in Louisiana.* Every state may impress upon all property within its own territory any character which it may choose; and no other state or nation can impugn or vary that character. In Louisiana, slaves, though movables by their nature, are immovable by destination of law. *McCullom vs. Smith*, 342, 352, 357.
3. *Descent of immovables.* The descent and heirship of immovables are exclusively governed by the law of the country within which they are actually situated. This is the doctrine of the common law. Story's Conf. § 483. *Ibid.* 355.
4. *Descent in Louisiana among intestate's children in general, and when some or one of them is a feme covert and non-resident.* *Ibid.* 352, 357.
See *CHANCERY*, 26, 27.
5. *Acquisitions after marriage—change of domicile.* The law of the actual domicile of husband and wife governs as to movable property acquired after a change of residence; and as to all immovable property, the law of the place where it is situated. Story's Conf. § 187. *Ibid.* 355.
See *CHANCERY*, 27.
6. *HUSBAND AND WIFE. Marital right to wife's movables and immovables, by what law determined.* The marital right to the wife's movables is determined as follows:
 1. In case there is no determinate domicile of either husband or wife, at the time of the marriage,—by the *lex loci contractus*.
 2. In case they have different domiciles—by the law of the husband's domicile.
 3. In case they agree, previously to the marriage, upon a place of residence after it, and that place actually become the place of the matrimonial domicile,—by the law of that place.
 4. In case there is a change of domicile after the marriage,—the law of the new domicile determines the marital right in the wife's movables, acquired after the change, in the place of the new domicile.
7. *Same. Immovables.* And in all cases, the marital right to the wife's immovables is determined by the *lex loci rei sitæ*.
8. *Same. Marital right to wife's acquets after the marriage, not in the place of the matrimonial domicile. How marital right is affected by a change of the form of such acquets from immovable to movable, and a reduction of the latter to possession by the husband with or without the wife's consent.* If husband and wife have their domicile in Tennessee, and a person die intestate in Louisiana, of whom the wife is a legal heir, leaving movables and immovables, which on petition of some of the heirs, are converted into cash or choses in action by a judicial sale,—the conversion, *per se*, will not affect the marital right; but that

CONFLICT OF LAWS.—Continued.

right will be determined by the law of Tennessee as to so much of the wife's share as was movable, and by the law of Louisiana as to the rest. And the law is the same, though he reduce the share, thus converted to possession, if it be done without her consent; but if it be reduced into possession by the husband under a power of attorney from his wife, his marital right will be determined by the law of Tennessee. *Kneeland vs. Ensley*, 620, 627, 630.

CONSEQUENTIAL DAMAGES.

See DAMAGES. CASE, ACTION OF.

CONSIDERATION.

Trust will not be implied without. *Thompson vs. Branch*, 390, 393, 394. See CHANCERY, 52.

CONSTITUTIONAL LAW

1. *Constitution of the United States. Authentication.* The Federal Constitution, art. 4, § 1, relative to the faith and credit to be given to the judicial proceedings, &c. of each state in the others, and the act of Congress of 1790, c 11—1 Story's Laws, 73, Gordon's Digest, art. 638—giving to those proceedings such faith and credit in every court in the Union as they have in the state whence taken, does not change the above rule of international law,—nor impose upon the tribunals of the state in whose courts a suit may be prosecuted thereon, all defences arising upon matters *ex post facto*, and affecting the remedy merely to which they would have been subject, if sued in the state where they hence taken. See Story's Conf. § 575, to 593; Comm. on Cons. § 1298 1307. *Estes vs. Kile*, 34.
2. *Constitution of Tennessee, art. 1, § 6. Trial by jury.* The act of 1822, c 29, which confers upon the county court the power "*to hear the proof and determine the matter*" involved in questions of filiation is to be understood of hearing and determining *without* a jury; and is constitutional. *Kirkpatrick vs. The State*, 124, 125, 126. See *Bastardy*.
3. *Same. art. 11, § 7. Partial laws.* An act of Assembly is not unconstitutional, as a partial law, because it excepts from its operation existing suits. So the act of 1835, c 26, authorising alimony in case of divorce *a vinculo*, as in case of a divorce *a mensa et thoro*, is not unconstitutional. *Chunn vs. Chunn*, 131, 136.
4. *Same. art. 1, § 9. Confronting witnesses.* Defendants in criminal cases have the constitutional right to have the witnesses personally present at the trial; and this though the prosecuting officer is willing to admit the facts which it is expected they will prove. *Goodman vs. The State*, 195, 196, 198. See CRIMINAL LAW.
5. *Same. Same. Dying declarations,* the admission of them in evidence is no violation of this provision of the constitution. The right of confronting witnesses, and the admissibility of dying declarations are coeval principles of the common law. The first was inserted in the constitution because it had been maintained with difficulty against the Crown by the popular party. The other had never been debated between these, and hence was omitted. *Anthony vs. The State*, 265, 277, 278.
6. *Constitution of the United States, art. 1, § 10, clause 1,—Constitution of Tennessee, art. 1, § 20. Obligation of Contracts.* It is not a violation of the obligation of contracts to release prosecution surety or bail, and substitute another instead of the first,—there being no contract on part

CONSTITUTIONAL LAW.—*Continued.*

- of him for whose indemnity the surety was taken. *Craighead vs. The State Bank*, 199, 204, 206.
7. *Same. Bank charter*, 1820, c 7. The charter of the "Bank of the State of Tennessee," it seems, was constitutional, according to *Briscoe vs. The Bank of the Commonwealth of Kentucky*, 11 Peters, 257. *Ibid.* 199, 205.
8. *Grant of a Lottery, whether a contract.* The grant of a Lottery by a private act of the Legislature is not a contract in the sense of this provision of the constitution. If there be a general law prohibiting Lotteries and inflicting penalties for drawing them, and the Legislature authorized one for a specific purpose, by a private act, such act is only a grant of immunity from penalties and indictments in that particular instance, and for that specified object. *Bass vs. The Mayor of Nashville*, 421, 425, 427.
9. *Same. Vested rights.* And if the grantees of such immunity, draw one or more classes of the Lottery, and pause in their proceedings, the specific purpose for which the immunity was granted remaining unattained, and there being no purchaser of a scheme, or holder of a ticket to be injuriously affected, the Legislature may prohibit the further exercise of the privilege without violating vested rights, *Ibid.* 426.
10. *Constitution of Tennessee, art. 2, § 18. When a bill becomes a law—relation.* When a bill has been signed by the speakers of both Houses of the Legislature, as it must be before it becomes a law, it takes effect from the date of its passage by relation; and if it be a repealing statute, it avoids an act done by authority of the repealed law in the interval between its passage and signature. *Dyer vs. The State*, 237, 255, and Note, 255, 256.
11. *Constitution of the United States, art. 4, § 2. Who is a citizen?* Free blacks are not citizens within the meaning of the provision of the Constitution of the United States, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *The State vs. Claiborne*, 331, 338, 341.
12. *Same. Same. Tennessee act of 1831, c 102.* A state statute making it unlawful for any free person of color to remove himself to the state to reside therein, and remain therein twenty days, does not violate this provision of the constitution. *Ibid.* 338, 341.
13. *Constitution of Tennessee, art. 1, § 8. "No freeman shall be taken", &c.* By *freeman* is here meant one who is entitled to all the privileges and immunities of the most favored class; and if more were meant, the provision only applies to those who are already citizens of the states; and consequently would not prevent the states from passing laws prohibiting a given class of persons from becoming citizens. *Ibid.* 341.
14. *Constitution of Tennessee, art. 11, § 5. Lotteries.* This provision, which directs that the Legislature "shall pass laws to prohibit the sale of lottery tickets in this State," is itself a prohibition of lotteries. *Bass vs. the Mayor of Nashville*, 421, 426, 427.
15. *Same, art. 1, §20—Retrospective Law.* A bargainor's title to land being inchoately divested by the signing, sealing and delivering of the deed,—and the acknowledgment or probate thereof, not having effect further to divest his title, but only to entitle the deed to registration, it follows that statutes, validating imperfect acknowledgments and probates, are not unconstitutional, though retroactive,—because they do not affect rights, but only evidence of facts. *Montgomery vs. Hobson*, 437, 454, 456. Story's Comm. Const. §1393.
16. *Particular and general law.* The legislature may by a particular law, prescribe as a duty, the doing of certain acts, which, if done without such authority, would be indictable by the general law. Thus the act of

CONSTITUTIONAL LAW.—*Continued.*

1826, c. 41, making it the duty of the Bank of the State of Tennessee to loan the depreciated notes of the Nashville Bank, to be repaid in part out of the funds, is constitutional, though to have made such a contract without such authority might have been usury. *Benton vs. the School Commissioners*, 585, 589, 590.

CONTRACT.

1. *Validity of, generally. Obligation of when, discharged or not.* The obligation of a contract for work and labor is neither annulled, because it is ascertained before the work is begun, that it is unnecessary or useless, nor because the employer cannot determine how he will have it done. *Graves vs. Caruthers*, 58, 62, 65, and see the 3d point in the abstract of the case.
2. *Same—Obligation between assignor and assignee.* If one joint undertaker of work assign to the other his interest in the job, the assignee risks the contingencies expressed in the contract, and is bound to pay the consideration promised the assignor, although the employer altogether fail. *Ib.*, 62, 64.
3. *Construction—Condition precedent as to place.* In a covenant to cut a certain number of cords of wood, at any place the covenantee sees proper, these latter words do not impose it on the covenantee, as a condition precedent, to seek the covenantor and give him notice of the place; and a plea of want of notice, not averring that the covenantor offered to commence the work, and desired to be shown the place, and continued ready, &c. is bad upon demurrer. *Massey vs. Shields*, 73, 79. *Harrison's Digest*, 622. *Gambling vs. Reid*, 281.
4. *Validity of, as regards Statutes. Usury.* A usurious contract is not void in toto, but only for the excess of usurious interest. *Reed vs. Moore*, 80, 81.
5. *Validity of, as regards public policy. Champerty and Maintenance.* See CHAMPERTY.
6. *Construction, as to description of premises.* See SALE.

CONTRIBUTION.

See SURETY, 3.

CONVEYANCE.

See DEED.

CORPORATION.

Process against, in suit before a justice of the peace. A justice of the peace in Tennessee cannot issue a *distringas*, and so cannot enforce the appearance of a corporation; but he may render judgment against a defendant for want of appearance to his summons—and this as well in the case of corporations as of natural persons; and therefore he has jurisdiction of the person of a corporation by summons alone. *Aliter* in England and New York, where there must be an appearance of the defendant before judgment, and where because an appearance cannot be entered by the plaintiff for a corporation, its appearance must be enforced by *distingas*, 2. *Archbold's Practice*, 106. *Union Bank vs. Lowe*, 225, 229, 231.

COUNTY COURT.

Jurisdiction of, in bastardy cases. *Kirkpatrick vs. The State*, 124, 125, 126. See *Bastardy* in this Index.

COVENANT.

1. *Particular covenants—of warranty in a deed.* All the heirs must be joined in an action against them on their ancestor's covenant of warranty. *House vs. Mitchell*, 133, 141. See *Ancestor and Heir* in this Index.
2. *Same. Same—of vendor out of possession.* No action can be maintained on the covenant of warranty in a deed made by a vendor out of possession of land adversely held. The deed and the covenants contained in it are void. *Williams vs. Hogan*, 187, 189. See CHAMPERTY 5.

CRIMINAL LAW.

BAIL.

1. *Who may let to bail—Sheriff when and when not. Recognizance when void.* Except in the special cases pointed out by law, the Sheriff has no power to let to bail persons committed for criminal offences. By the act of 1831, c. 4, he may not let to bail one who has been committed because the examining magistrate did not know whether the offence was bailable or not; and a recognizance reciting that cause of its being taken by the Sheriff is void. *The State vs. Horn*, 473, 475, 476.

COST.

See POST 32.

CRIMINAL IMPUTABILITY.

2. *Solution of the questions—By what signs is it to be known that the agent has not a knowledge of the morality of his act, and the liberty to abstain from it? What degree of injury of the intellectual faculties is necessary to destroy imputability?* Note to *Anthony vs. The State*, 280, 281.

EVIDENCE.

3. *Dying declarations.* It is error to admit as evidence to the jury a copy of dying declarations, taken down in writing by the examining magistrate, though such declarations would have been evidence had they been sworn to by the magistrate. *Beets vs. The State*, 106, 107, 108.
4. *Same. Written statement, when admissible as secondary evidence.* The written statement taken by the magistrate would be admissible as secondary evidence if the magistrate swear that he cannot recollect the statement of the deceased. The rule stated in *Peck's Reports*, 118, approved. *Ib.*, 103, 109.
5. *Same. Declarant must be aware of his danger.* If a dying person either declare that he knows his danger,—or it is reasonably to be inferred, from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence. The rule stated, 1 East., P. C., 354, recognized. *Anthony vs. The State*, 265, 273.
6. *Competency of witnesses. Persons of mixed blood.* Under the act of 1794, c. 1, § 32, declaring all persons of mixed blood, descended from negro and Indian ancestors to the third generation inclusive, whether bond or free, to be incapable in law to be witnesses in any case whatever, except against each other,—no person thus disqualified can be a witness in a State prosecution for a defendant, who belongs to one of the disqualified classes. *Jones vs. The State*, 120, 121, 122.
7. *Same. Grand Jurors.* If a witness examined before the grand and petit juries give contradictory testimony, and is indicted for the perjury committed therein, the members of the grand jury are competent witnesses to prove the contradiction. 4 Bl. Comm., 126, note 4 by Christain. *Crocker vs. The State*, 127, 130, 131.

CRIMINAL LAW.—Continued.

GAMING.

8. *What it is. Betting on election not.* Gaming is betting or wagering upon the event of any proposed course of action or contest, and then commencing and prosecuting the proposed course of action or contest in consequence of the bet or wager with a view to produce the event, and determine the bet or wager. But an election is not commenced and prosecuted with any such view; therefore to bet on an election is not gaming. *The State vs. Smith*, 99, 100, 102.

GRAND JURY.

9. *Power to send for witnesses.* The power of the grand jury to send for witnesses by the act of 1824, c. 5, § 2, extends not beyond the case of gaming. *The State vs. Smith*, 99, 100, 102.
10. *Clause of secrecy of oath of.* The reason of the injunction of secrecy in the oath of the grand jury is one of public policy, namely, that the evidence produced before them may not be counteracted by subornation. *Crocker vs. The State*, 127, 130, 131.
11. *Pannel, how supplied, when some are incompetent.* If there be placed on the grand jury panel persons not competent to be grand jurors, the court to which the panel is returned may strike them off, and summon others in their stead. 1 Chitty's Criminal Law, 309; 1837, c. 53, § 4; c. 69, § 2; 1799, c. 6, § 4. *Jetton vs. The State*, 192, 194, 195.
12. *Witness sent to, how to be sworn.* If a witness who is sent to the grand jury be sworn in open court, though not in the immediate presence of the judge, or even in his temporary absence from the bench, it is good. *Ib.* 194, 195.

HOMICIDE.

13. *Degrees of guilt of participators in.* If a party be engaged in an unlawful act, and another, though without concert, assist him, and actually perpetrate the mischief,—the first party is responsible for whatever result he himself intended, as though he had been the sole perpetrator. And the degree of the abettor's guilt will depend on the intent with which he acted. *Beets vs. The State*, 106, 107, 109.
14. *Same. Authorities—distinctions.* The rules as to the different degrees of homicide of which several persons, present at the act, may be guilty, stated in 1 Russell, 398, Am. Ed., 1 Hale, c. 34, the three last paragraphs, 1 Hawkins, c. 31, § 35,—and the distinctions taken in the latter book from § 40 to § 50, inclusive, recognized. *Ib.* 108, 109.
15. *Murder in the first degree.* To constitute this offence, the killing must be wilful, and malicious; and deliberate, and premeditated. *Anthony vs. The State*, 265, 276, 280.
16. *Same.* A killing not superinduced by passion or provocation, deliberate and premeditated, is murder in the first degree, though deliberated and premeditated but a moment. *Ib.*, 276, 277.
17. *Murder in the second degree. Manslaughter.* A killing under the influence of passion, or upon provocation, before the passion had time to subside, would only be murder in the second degree,—or manslaughter if the provocation was a sufficient and legal one. *Ib.* 276, 277. The definition in *Dale vs. The State* repeated and recognized. *Ib.* 277.

IMMIGRATION INTO THE STATE

18. *Of free persons of color prohibited, constitutionality of the law considered.* *The State vs. Claiborne*, 331, 338, 341.
See CONSTITUTIONAL LAW, 11, 12, 13.

CRIMINAL LAW.—Continued.

INDICTMENT AND PRESENTMENT.

19. *Finding of the bill, ambiguity in.* If an indictment be preferred against two for a certain offence, and the record shows that the grand jury came into open court, in a body, and returned a bill of indictment against one of them for the same offence, upon which he is afterwards arraigned, tried and convicted,—the judgment will not be arrested on account of this ambiguity in the record,—for the fact that the indictment was preferred against two does not make it less an indictment against one of the two. *Blevins vs. The State*, 82, 83.
20. *What is evidence of the finding.* The principle settled in *Chappel vs. The State*, 8 Yerger, 166,—that no less than record evidence can be received to establish the fact, that the accused has been indicted in due form by the grand jury, approved but stated to be upon the verge of the law. *Id.* 83.
21. *Need not appear of record to be founded on presentment.* It is not essential that the record show by any order or memorandum, that the indictment is founded upon the presentment. If it appears that there had been a presentment made against the same individual for the identical same offence for which he was indicted, that will be sufficient to show that the indictment was founded on the presentment, and to excuse the attorney general from the obligation to mark a prosecutor. Ruled accordingly, *McHenry vs. The State*, Knoxville, June Term, 1837, not reported. *The State vs. McCann*, 91, 92.
22. *Founded on void presentment must have prosecutor marked.* From the rule that the power of the grand jury to send for witnesses, by the act of 1824, c. 5, § 2, extends not beyond the case of gaming—*ante* 9—it follows that a presentment for betting on an election founded on the testimony of a witness sworn to testify of unlawful gaming, is void. And an indictment founded on such presentment cannot be preferred without a prosecutor marked thereon,—the act of 1817, c. 61, § 4, only declaring that indictments for gaming may be preferred without a prosecutor being marked thereon. *The State vs. Smith*, 99, 100, 102. *Ante* this Title, 8, 9.
23. *How finding should be endorsed.* "True Bill" endorsed on a bill of indictment, and signed by the foreman of the grand jury, is a sufficient memorandum of the finding, and is as good as—"A true bill." It seems that the word "true" endorsed on the bill and effectually signed, would be a sufficient memorandum of the finding, and the words, "not true" of the rejection of a bill. Several equivalent expressions enumerated by the Court. *The State vs. Elkins*, 109, 110, 112.
24. *How they respectively become part of the record.* An indictment is only signed by the foreman of the grand jury, and therefore, unless it appears from the record, that the bill was returned by the jury into open court, "a true bill," it cannot appear that it has been before them, and found by them. But a presentment is signed by all the jurors, and we have thus an assurance that they have acted on it, and found the facts it presents, as satisfactory as would be an entry on the record. *The State vs. Muzingo*, 112, 113.
25. *Quashing.* The court is not bound to quash an indictment or presentment. The party may be left in the discretion of the court to demur, &c. *Hawkins*, Book, 3, c. 25, § 146. 1 Dev. & Bat. 195. *Jetton vs. The State*, 192, 194.

JURY PETIT.

26. *Challenge propter affectum.* Loose impressions and conversations of a juror as to the prisoner's guilt or innocence, founded upon rumor, would not, if disclosed by him or others to the court, on the selection of

CRIMINAL LAW—*Continued.*

the jury, have the effect to set him aside as incompetent; nor, if disclosed after verdict, be a cause of new trial. *Howerton vs. The State*, 262, 264.

See GRAND JURY.

LARCENY.

27. *Essence of it.* Receiving goods with the owner's consent from his slave, is not larceny, it being of the essence of the offence that the goods be taken against the will of the owner,—*invito domino*. See Foster, 123; 2 Russell, 93, 116, 3d Am. Ed. *Dodge vs. Brittain*, 84, 85, 86.

MANSLAUGHTER.

28. See *ante*, this title, 17.

NEW TRIAL.

29. *Whether after acquittal.* In all criminal cases, of every grade, if the defendant be acquitted by the jury, though the acquittal might have been occasioned by the error of the court, the defendant must be discharged of the offence alleged against him in that indictment. *The State vs. Curle*, 190, 191. Harrison's Digest, 859, and *Addenda*, 2333.
30. What expression of opinion would not be a cause of new trial. *Howerton vs. The State*, 262, 263, 264. See this title.

NUISANCE.

31. See RETAILING OF LIQUORS, *post* this title.

PRACTICE.

32. *Cause stricken from the docket.* In case of acquittal in the circuit court, in criminal cases, if the state appeal, the cause will be stricken from the docket of the supreme court for want of jurisdiction. *The State vs. Curle*, 190, 191. *Costs certified to county court in this case.*
33. *Trial postponing.* Where a defendant, in a criminal case, offers a sufficient affidavit for a continuance, stating the absence of witnesses and the facts to which they are expected to testify, it is error to refuse a continuance, even though the prosecuting attorney offers to admit, not simply that the witnesses would testify to the facts stated, but also, the truth of those facts; for the defendant has the constitutional right of having the witnesses personally present at the trial. *Goodman vs. The State* 195, 196, 198.
34. *Trial postponed below or not, error or not.* Where the circuit court refuses a continuance for the insufficiency of the reasons stated in the affidavit, the court of errors would be extremely cautious and circumspect in controlling its discretion, though they entertained a clear opinion that the reasons were sufficient. *Ibid.* 197.

PROSECUTOR.

35. When dispensed with. See *ante*, 8, 21, 22.

RECOGNIZANCE.

36. *Ambiguity in.* The grammatical connection of words as relative and antecedent will not be allowed to prevail to the destruction of the meaning of the sentence. Noy's 3d Maxim; Jenkin's Cent. 189. Thus where three persons, two of them of the same surname, entered into a recognizance in the following order,—T. C. in the penalty of \$3000, and F. and G. Y. C. in the penalty of \$3000, jointly and severally conditioned to be void if the said C. appeared: HELD, that by the scope of the paper, no ambiguity existed as to which C. was meant by the words "said C." *The State vs. Cherry*, 232, 234, 236.

CRIMINAL LAW—*Continued.*

RECOGNIZANCE—*Continued.*

37. *What sufficient allegation in sci. fa. that recognizance was acknowledged before justice.* If a *sci. fa.* recite that certain justices by name returned a recognizance into the clerk's office, and that it was witnessed by them, these are sufficiently certain allegations that the recognizance was acknowledged before them. *Ibid.* 236.
38. *Becomes part of court's record how.* The filing in a court of record, by a magistrate, of a recognizance purporting to have been taken before him, makes it part of the court's proceeding, and communicates to it the dignity and verity, which, by law, appertain to records. *Barkley vs. The State*, 93, 94.
39. *How one so filed may be questioned or not.* The verity of a recognizance so filed, cannot be questioned by the plea of *non est factum*, and if such plea be put in it is demurrable. *Ibid.* 94.

RETAILING SPIRITUOUS LIQUORS.

40. *Offence defined.* The act of 1779, c. 10, creates "the offence" of unlicensed retailing of spirituous liquors, subjecting persons guilty thereof to a penalty of \$125, and defining it to be—1. The selling of them in smaller quantities than a quart.—2. The selling of them by the quart or greater quantity, to be drunk at the place where sold. *Dyer vs. The State*, 237, 247, 255.
41. *License laws repealed.* The act of 1838, c. 120, operates virtually as a repeal of all laws authorising a license to retail spirituous liquors; because it makes all retailing, without exception, a misdemeanor indictable and punishable by fine at the discretion of the court. *Ibid.* 253.
42. *Whether the penalty of \$125 is repealed.* It seems that the act of 1779 is not repealed so far as it inflicts the penalty of \$125 upon persons selling by the quart or greater quantity, to be drunk at the place where sold. *Moore vs. The State*, 8 Yerger, 253, recognized. *Ibid.* 254.

SCIRE FACIAS.

43. *See this Title, RECOGNIZANCE.*

DAMAGES.

1. *On appeals from justices.* The act of 1823, c. 54, § 3, authorises 12½ per cent. per annum on appeals from justice's judgments. *Union Bank vs. Lowe*, 225, 231.
2. *Consequential, on misfeasance.* *Childress vs. Yourie*, 561.
See CASE, ACTION OF.

DEBT.

Extinguishment. Taking a bill single in consideration of a simple contract demand extinguishes it, and no action can be maintained founded upon the consideration. But a promissory note does not extinguish the demand in consideration of which it was given. *Craighead vs. The State Bank*, 199, 204, 206.

DEBTOR AND CREDITOR.

See CHANCERY, 10, 11, 12, 13, 14.

DECEIT.

Defined and distinguished from fraud. Note to *Donelson vs. Clements*, 157, 158.

DECLARATION.

See PLEADING, 14.

DECLARATIONS IN ARTICULO MORTIS.

See CRIMINAL LAW, 3, 4, 5.

DEED.

1. *Of non-resident bargainor how proved for registration.* How the deed of a non-resident bargainor may be proved and the probate certified, so as to be admissible to registration, under the act of 1807, c. 85, § 3. *Rochell vs. Benson*, 3, 4, 7.
2. *Irregularly registered, how it affects bargainor's title.* If land be sold under execution, the title passes as against the defendant and those claiming under him by conveyance subsequent to the judgment, notwithstanding any irregularity in the registration of the title deed. 3 Yerger, 171; 10 Yerger, 1. *Ibid.* 6, 7.
3. *Though irregularly registered, estops vendee to claim against vendor.* *Ibid.*
See ESTOPPEL. VENDOR AND PURCHASER.
4. *Of feme covert.* See that Title in this Index.
5. *Registration of, date of may be supplied how.* If it appear from the registry that a deed and the certificate of probate or acknowledgment endorsed thereon had been registered, but the date of the registration omitted, the register or deputy register may be examined to supply the date. *Miller vs. Estill*, 479, 483, 484.
See REGISTRATION.
6. *Operation of the statutory deed*, 1715, c. 38, § 5, &c. Our statutory deed does not operate like the ancient feoffment—to pass the fee simple and turn all other estates into rights of entry or action. It operates as a grant—to pass nothing but what the bargainor may lawfully sell. See Burrow, 92. *Miller vs. Miller*, 484, 491, 496.
7. *Executed under power, when the latter will be presumed to be well proved.* When the parties in equity in their pleadings treat a title as vested in one of them by deed made under a power of attorney, which is not exhibited in the pleadings, the court will take it for granted that the power was well proved to authorise the conveyance. *Claiborne vs. Crockett*, 607, 612.

DELIVERY BOND.

See BOND, 6, 7.

DESCENT.

1. *Seizin in deed.* Independently of any statutory provision upon the subject, it may well be doubted whether the rule of the common law ought to be maintained in this country—"That when a person acquires an estate in fee simple in land, by descent, it is necessary that he should enter on the lands to gain a seizin *in deed*, in order to transmit it to his heirs." 3 Cruise's Dig. Tit. 29, c. 3, § 5; Littleton, § 8. *Guion vs. Burton*, 565, 570, 572.
2. *Rule of the Common Law repealed.* The act of 1784, c. 22, § 2, transmits to the heirs of an intestate owner, *whatever right, title or interest* he had in the inheritance of land, at his death, without his ever having had any seizin *in deed*. 4 Kent's Com. 398, 3d Ed. *Ibid.* 571.
3. Decisions upon, collected and arranged, note, 572, 573.

DEVISAVIT VEL NON?

1. *Proof of this issue, subscribing witnesses.* The act of 1789, c. 23, going upon the principle that this issue implies doubt and suspicion, requires the party, in the first instance, to call all the living witnesses within the jurisdiction of the court; and that is the only change the act has made on the common law. *Crockett vs. Crockett*, 95, 96, 97.

DEVISAVIT VEL NON?—Continued.

2. *Handwriting may be proved on this issue when.* But if the witnesses reside out of the jurisdiction of the court, proof of their handwriting is admissible, as it is at common law. 1 Starkie's Ev. 325; 2 Dev. and Bat. 311. *Ibid.* 97. The fact that the witnesses do reside out of the jurisdiction of the court may be shown by any evidence tending to prove it. The production of a subpoena returned "not to be found," is not necessary. That return is sufficient evidence of the fact; but if the return show that the witnesses are within the jurisdiction of the court, the secondary proof is inadmissible. *Ibid.* and *McDonald vs. McDonald*, 5 Yerger, 307.

DISTRIBUTIONS, STATUTE OF.

See SUCCESSION. WIDOW.

DISTRINGAS.

See CORPORATION.

DOMICIL.

Law of governs marital rights as to movables. *McCullom vs. Smith*, 342, 352, 357.

See CONFLICT OF LAWS. CHANCERY, 26, 27.

DOWER.

See CHANCERY, 28. CHAMPERTY, 3, 4.

Changes in the law of England as to, by statute 3 and 4 William IV., c. 105. Note, 389, 390.

EJECTMENT.

1. *Lessor's Title.* His vendee is estopped from disputing it; 181, 186.

See VENDOR AND PURCHASER. SALE.

2. When tenant's title becomes adverse to his landlord's, 525, 544, 546.

See LANDLORD AND TENANT.

EMANCIPATION.

Whether chairman's report must appear of record. The proceedings under the act of 1801, c. 27, to emancipate a slave being in the nature of a suit, and the order of emancipation in the nature of a judgment, it will be a sufficient emancipation if it recites the matters of fact which constituted the reason of adjudging the slave to be free, though the order do not show that the chairman made the report contemplated by the act, that the intention and motives of the emancipator were consistent with the interest and policy of the state. *Stewart vs. Miller & Moore*, 574, 576, 578.

ENTRY.

See GRANT, 14.

EQUITY OF REDEMPTION.

Under what circumstances barred or not by time. 513, 516, 518 and note.

See CHANCERY, 44.

ERROR AND SUPERSEDEAS, WRITS OF.

They suspend the decree from the date of the fiat. 607, 609, 612.

See CHANCERY, 46, 47.

ESTATE.

1. *Descent of.* Liability of heirs by descent on ancestor's covenant of war-

ESTATE.—Continued.

- ranty, 139, 141, and see **ANCESTOR AND HEIR**, 23. *Harrison's Digest*, 1022.
2. *Same*. Who is heir by descent, and to whom. 565, 570, 572. *Harrison's Digest*, 1020.
See **DESCENT**, 1, 2, 3.
3. *Tenancy by courtesy*. What seizin of wife will suffice to make the husband tenant by the courtesy. 565, 570, 572.
See **DESCENT**.

ESTOPPEL.

Between vendor and purchaser. Vendee is estopped to deny vendor's title, though the deed under which the latter claims is irregularly admitted to registration. *Rochell vs. Benson*, 3, 4, 7. Deed, 2. Vendor and Purchaser, 3. Sale, 15.
See **ACQUIESCENCE AND WAVER**. **BOUNDARIES**, 3. **EVIDENCE**. **GRANT**, 4.

EVIDENCE.

1. *In malicious prosecution*. The onus of proving want of probable cause lies on the acquitted defendant. Note 87. See **CASE, ACTION OF**.
2. *By subscribing witnesses*. At common law all the subscribing witnesses need not be called, unless it first appear that the instrument produced labors under doubt and suspicion. 1 *Starkie's Ev.* 320; 2 *Id.* 923; 6 *Am. Ed. Crockett vs. Crockett*, 95, 97. See cases collected on this point, note, 97, 98.
3. Secondary, when subscribing witnesses cannot be found. *Ibid*, and *Harrison's Digest*, 1089, 1092. What evidence will suffice that witnesses cannot be found, 95; And See **DEVISAVIT VEL NON**.
4. Dying declarations, 106, 109. Secondary evidence of, when admissible. *Ibid*. See **CRIMINAL LAW**.
5. *Bills of exceptions, what must appear in*. It must appear that all the evidence submitted to the jury is contained in the bill of exceptions, or it will be presumed that there was evidence sufficient to justify the verdict. *Trott vs. West*, 163, 169. *Harrison's Digest*, 1116. And See **BILLS OF EXCEPTIONS**.
6. *Interest of witnesses*. Prosecution surety or bail may be made a competent witness for the party for whom he stands bound by releasing him of record, and substituting another in his stead. *Craighead vs. The State Bank*, 199, 204, 205; *Ross vs. Blair*, 525, 544. So a guardian, who commences an action of ejectment in the name of his wards, and gives his bond for the prosecution of it, may be released when they come of age, and examined as a witness. *Ibid*, 544. In like manner a second husband who joins his wife in releasing to the heir of the first husband his wife's dower, may be a witness for the heir in an action of ejectment for the land. *Ibid*, 544, 545. *Harrison's Digest*, 1048.
7. *Admission by conduct and demeanor*. On presenting his account to a defendant, if he admit the correctness of the charges, but say he believed he owed the plaintiff nothing, yet give no reason for his belief, and show nothing in support of it, the whole must be left to the jury, who may reject the explanation, and give their verdict on the admission. Claiming a credit as to one item of an account, and remaining silent as to the rest, is a strong circumstantial proof of the correctness of the rest. *Craighead vs. The State Bank*, 199, 204, 206.
8. *Examination of witness*. Whether party can discredit his own witness. Note, 468. *Harrison's Digest*, 1160.
9. *Emancipation, order of*, good evidence in an action for freedom; or in an action of trespass by the party emancipated upon the plea that he is a

EVIDENCE.—Continued.

- slave, though the chairman of the county court did not report upon the petition, as contemplated by the act of 1801, c 27. *Stewart vs. Miller Moore*, 574, 576, 578.
10. *Competency of sheriff to prove want of notice of sale.* The sheriff is competent, but not bound, to give evidence of his own failure to give notice of the time and place of sale, as required by the act of 1799, c 14, § 1. *Valentine vs. Cooley*, 613, 618, 619.

EXECUTION.

Chancery jurisdiction in aid of, under what conditions exercised. *Ewing vs. Cantrell*, 364, 373, 377. See CHANCERY, 11, 12, 13, 14.

EXECUTORS AND ADMINISTRATORS.

1. *Limitations of actions against, by acts of 1789, c 23; 1829, c 57, and 1831, c 123.* The acts of 1829 and 1831, prohibiting suits against personal representatives for six months from their qualifications do not, that long, extend the periods within which, by the act 1789, they must be sued, and must close their administration. *Greenway vs. Hunter*, 73, 75. Cases upon the subject collected, note, 75.
2. *Same. Special request to delay suit. Construction of 1789, c 23, § 4, 2d proviso.* If an administrator pay part of a debt of the intestate, and "promise to pay the balance soon," that does not amount to a *special request* to delay bringing suit so as to stop the operation of the statute of limitations during the time of the delay. *Trott vs. West, Moss, & Co.*, 163, 167, 169.
3. *What is assets? Not a bond of indemnity.* Neither a bond of indemnity given to a testator, nor a judgment recovered thereupon by him, is assets in the hands of his personal representative, except to be applied to the purpose of the indemnity; and a bill by residuary legatees against the executor to compel him to account for such judgment on the ground, that with due diligence, it might have been collected, will not be entertained. But the executor will be compelled in equity to distribute to the residuary legatees any part which he may have collected of such judgment, and which remains in his hands unclaimed by the person against whose demand the indemnity was given. *Molloy vs. Elam*, 590, 594, 596. *Harrison's Digest*, 1142.
4. *Compromising debt to deceased—devastavit.* If an executor or administrator compromise or compound with the obligor in a bond of indemnity given to the deceased, such compromise or compounding will not be sustained to the prejudice of the party against whom the indemnity was given. *Williams on Executors*, 1107, 8. *Ibid* 590, 594, 596.

FEME COVERT.

1. Whether barred by remarking of her land. *Yarborough vs. Abernathy*,—413, 418, 420. See BOUNDARIES, 5.
2. Mode of conveying her land. *Montgomery vs. Hobson*, 437, 448, 459. See HUSBAND & WIFE, 4.
3. Conveyance of her land by husband, no discontinuance. *Müller vs. Müller*, 484, 491, 496. See HUSBAND & WIFE, 5.

FINE.

See HUSBAND & WIFE, 4.

FORCIBLE ENTRY AND DETAINER.

1. *Who may be parties—tenants in common.* One tenant in common may sue in ejectment or forcible entry and detainer without joining his co-tenant. *Turner vs. Lumbrick*, 7, 11, 13. See PLEADING.
2. *Description of petitioner's interest.* The complaint need not specify the

FORCIBLE ENTRY AND DETAINER.—Continued.

- plaintiff's estate in the premises with technical accuracy. It must show that he had some estate, but need not show the precise quantity of it. *Ibid*, 11, 12.
3. *What constitutes the injury.* Acts not of violence or outrage upon the person or property, but tending to produce a breach of the peace, will constitute the injury, *Ibid*, 12.
 4. Synopsis of the statute and collection of cases, note, 13, 14.

FRAUD.

1. Defined and distinguished from deceit. Note to *Donelson vs. Clements*, 157, 158.
2. In assignments in trust for creditors. *Peacock vs. Tompkins*, 317, 323, 331; *Richmond vs. Crudup*, 581, 582, 584. And See ASSIGNMENT IN TRUST FOR CREDITORS. CHANCERY, 17, 18, 19.

FRAUDULENT CONVEYANCE.

1. *By judgment debtor, conveyee's right as to execution creditor of vendor.* One who buys land from a debtor, after judgment, cannot set up an outstanding title against a purchaser at a sale upon the execution of the judgment. 10 *Johnson*, 223. *Rockell vs. Benson*, 3, 4, 7. See ESTOPPEL, AND VENDOR, AND PURCHASER.
2. *Of slaves.* Under the acts of 1784, c 10, § 7; 1789, c 59, § 2, and 1831, c 90, § 1, a sale of slaves, though accompanied with delivery to the vendee, is not good against the vendor's creditors without a bill of sale registered. *Banks vs. Thomas*, 28, 31, 33.
3. *Construction of said acts.* Upon the construction of the two first of these acts, the utmost that has been decided in North Carolina and Tennessee, is, that as between the parties, a sale of a slave, accompanied with possession in the vendee, is good without a bill of sale. *Douglass vs. Morford*, 8 *Yerger*, 373; *Payne vs. Lassiter*, 10 *Yerger*, 507, recognized. *Ibid*, 32, 33.
4. *Good between parties—void as to creditors.* A conveyance in fraud of creditors is not merely voidable at the option of the creditors, but it is absolutely void, as though it had never existed; and it is incapable of confirmation. And though good as between the parties, it is to be treated, when those as to whom it is void, are contesting it, as though it were void for every purpose. *Ibid*, 33.
5. *Exception.* The only exception to the generality of these rules is that which is recognized in *Floyd vs. Goodwin*, 8 *Yerger*, 434, namely that sales made by public officers, under process of law, are not within the purview of these acts. *Ibid*, 32. Note. Perhaps sales by executors are excepted. See *Potter vs. Coward*, 32. See ASSIGNMENT IN TRUST FOR CREDITORS, CHANCERY, 12, 13, 14, 15, 16.

FREEDOM.

1. *Bequest of.* A bequest of freedom is not to be defeated by any right of disposition, not exercised, which may be given to a legatee for life of the slave's services. *Jacob vs. Sharp*, 114, 116, 117.
2. *Ambiguity in bequest of, favorably construed.* If there be in a will a bequest of a present right of future freedom, to be enjoyed after the determination of a life estate in the slave's services coupled with a contingent power of disposal in the legatee of the services, and there be doubt as to the meaning of those clauses, the power of disposition must be construed to be subordinate to the higher and more important right of freedom. *Ibid*, 117, 118.
3. *Right to, vested by bequest with contingent power of disposal.* A bequest of slaves to a wife to keep them if obedient to her, and at her

FREEDOM.—Continued.

- death "to be set free,"—but if disobedient to dispose of them at pleasure, vests the slaves with a present right of future freedom, defeasible by the exercise of the wife's contingent right of disposal. Marriage is not an exercise of that right. *Ibid*, 114, 119.
4. *Bequest of after life estate, what words amount to.* The words, "to belong to, and be at my wife's disposal and command during her life time, and at her death to be emancipated," give the wife no more than a life estate, and invest the slaves with a present right to be emancipated at the death of the wife. *Lavina vs. Duffield's Executors.* Note 117.
 5. *Bequest of, power of court to assent to.* See the whole case of *Jacob vs. Sharp*, and concluding paragraph, 119.

GAMING.

1. What is gaming,—not betting on elections. *The State vs. Smith*, 99, 100, 102.
2. Power of Grand Jury to send for witnesses in case of. *Ibid*, 102, 103. See CRIMINAL LAW, 9.

GIFT.

1. *What disposition of a slave by a father to a child is a bailment or a gift within the North Carolina act of 1806—Limitations.* If, on the marriage of a child, slaves be put by the father into his possession, without any expression of the father's purpose therein, it is to be regarded as a bailment and not a gift under the North Carolina act of 1806. And no length of such possession will give the bailee title under the act of limitations. But, in such case, he may acquire title under the act, by afterwards assuming, with the father's knowledge, to hold for himself; or, by the father's treating the possession as the possession of the child: for from hence it may be inferred that the transaction was a gift at first, or that a gift had been afterwards made. *McKisick vs. McKisick*, 427, 434, 436.
2. *Inter vivos and mortis causa of securities for money.* Choses in action may be validly given *mortis causa*; and, a fortiori, they are the subject of a valid donation *inter vivos*. And a mere delivery accompanied by words of donation will be a good gift of them, and operate to vest in the donee a property in the money secured by them. And the gift will be good, though the delivery be to a third person for another. *Brunson vs. Brunson*, 608.

GRAND JURY.

1. Power to send for witnesses in gaming cases. *The State vs. Smith*, 99, 202.
2. Indorsement of finding on bill. *The State vs. Elkins*, 109, 112. See CRIMINAL LAW, 19 to 24.

GRANT.

1. *When it begins to exist—date—registration—relation.* The date of a grant, not that of its registration, designates its commencement as a muniment of title. Whenever registered, a grant relates to, and has full and complete existence, for all purposes, from its date; the registration not being intended to give it existence, but to preserve and perpetuate the evidence that it already exists, and being itself as good without as with a date. See *Van Pelt vs. Pugh*, 1 Dev. & Bat. 210. *Brown vs. Baldrige*, 1, 2, 3.
3. *Limitation.* Hence the time of prescription is to be counted from the date, and not from the registration of the grant,—the grantee's right to sue a trespasser commencing from the former period, and not at the latter. *Ib.*, 2, 3.]

GRANT.—Continued.

3. *Boundaries of obliterated, how restored.* *Riggs vs. Parker*, 43, 43, 51; *Whiteside vs. Singleton*, 218, 219, 220; *Yarborough vs. Abernathy*, 413, 418, 420. See BOUNDARIES.
4. *Entry and Grant, partial invalidity of, for want of notice to occupant.* If without the notice required by the act of 1824, c. 22, § 6, an entry be made, including in part, land occupied and cultivated by another, the entry and grant therefor obtained are void *pro tanto*. And, if the occupant after the making of such entry, agree that it may be surveyed, on condition that the enterer, after obtaining a grant, convey to him the land cultivated by him, he does not thereby waive the notice, nor is he estopped to insist that the entry and grant are void. *Horn vs. Childress*, 102, 103, 105.
5. *What is a waiver of such notice or not.* This case distinguished from *Wilson vs. Hudson*, 8 Yerger, 398, where the occupant was present when the entry was made, and consented thereto. On the point of the partial invalidity of the entry and grant, see *Dew vs. Nizon*, 10 Yerger, 518; *Danforth vs. Wear*, 5; Cond. R. 722; 2 Peters, 236. *Ib.*, 105, 105.
6. *Calls in, material and certain control, those less so.* The most material and most certain calls control those which are less material and less certain. *Newson vs. Pryor*, 7 Wheaton, 7. Hence where a grant calls for a certain number of poles to "a stake, crossing the river," the line must cross the river, though the distance terminates before reaching it. *Whiteside vs. Singleton*, 207, 217, 218. See INTERPRETATION.

GUARDIAN AND WARD.

1. Purchase by guardian with ward's money, option of ward as to. *Caplinger vs. Stokes*, 175, 180.
See CHANCERY, 20, 21.
2. *Appointment of guardian, omission of wards' names in.* The omission to state the names of wards in the record of the appointment of the guardian, if a defect is remedied by the recital of their names in the guardian's bond, entered of record immediately after the entry of the appointment. *Ross vs. Blair*, 525, 545.
3. *Whether lease of ward's land by guardian is avoided by omission of covenant against waste.* The omission of a covenant against waste in a guardian's lease, though the covenant be required by the statute of 1762, c. 5, § 13, does not vitiate the lease, or absolve the tenants from the duties and liabilities of the relation. *Ibid.* 545.

HOMICIDE.

See CRIMINAL LAW, 13 to 17.

HUSBAND AND WIFE.

See CHANCERY, 22 to 35.

1. Divorce *a mensa et thoro*, alimony thereupon, 131 to 137. Divorce *a vinculo*, decree thereupon as to property, *Ibid.* Husband cannot resist a decree for alimony because his creditors may be affected by it, *Chunn vs. Chunn*, 135, 137. Antenuptial conveyance by wife of her chattels. *Jordan vs. Black*, 142, 149. Marital right in wife's movables and immovables. *McCullum vs. Smith*, 342, 352, 357; *Kneeland vs. Enaley*, 620, 627, 630. See CONFLICT OF LAWS.
2. Wife's equity to a settlement out of her personalty not reduced into possession. *Dearin vs. Fitzpatrick*, 551, 559, 560, and note.
3. Deed of feme covert cancelled for fraud or surprise in acknowledgment, or not. *Montgomery vs. Hobson*, 437, 456, 458.
4. *Conveyance by husband of wife's land—analogy between conveyance by fine and statutory deed.* In the conveyance by fine, the consor's ac-

HUSBAND AND WIFE.—Continued.

knowledge of the conusee's right is the inception of the conveyance. The judgment of the court perfects it. From the last principle, it follows, that in the conveyance of the wife's land, the acknowledgment of the husband and wife need not be simultaneous, nor by him *before* her.

In the conveyance by statutory deed, the bargainee has an inchoate title by the signing, sealing and delivering. The registration makes it complete. The bargainor's signing, &c. stand in the place of the conusor's acknowledgment; and the registration, like the judgment, accomplishes the conveyance. The bargainor's acknowledgment of the signing, &c. does not *further divest* his title; it only authenticates the signing, &c.; and in the register's warrant for admitting the deed to record.

A *feme covert's* statutory deed of her land more closely resembles the fine. Her signing, &c. are inoperative till acknowledged in court. Her title is not inchoately divested till the signing, &c. are acknowledged. The acknowledgment is the first act which has legal effect, but when made the deed takes effect from the signing.

Feme Covert's deed how executed. From the principle that it is the husband's signing, &c. which passes *his* right, and the wife's acknowledgment, which passes *her's*, it follows that her acknowledgment, when made in a court having the right to take it, is good to divest the title from her signing, &c. by relation; whether her husband is present to acknowledge at the same time, or is absent and ignorant of the transaction, and though he never acknowledge his signing, &c. *Montgomery vs. Hobson*, 457, 448, 458.

5. *Operation of our statutory deed made by husband, of land, the joint property of himself and wife. Statute of limitations.* Our statutory deed does not operate—like the ancient feoffment—to pass the fee simple and turn all other estates into rights of entry or action. It operates—as a grant—to pass nothing but what the bargainor may lawfully sell. See *Burrow*, 92. Therefore a husband's deed, acknowledged or proved, and registered, of land in the joint seisin and possession of him and his wife, is not a discontinuance of her estate. The bargainee's possession is not adverse to her right any more than her husband's was, but is consistent with her right, as was her husband's. Consequently the statute of limitations does not begin to turn the bargainee's possession into title against her till her discoverture, after which her title will be barred by the adverse possession of her husband's bargainee in *seven*, and not in *three* years. *Miller vs. Miller*, 484, 491, 496.

IDIOT AND LUNATIC.

1. *How to be sued.* An action at law cannot be sustained against a person in the character of guardian of a lunatic, without joining the *non compos* in the action as a party defendant. 2 *Saund.* 333, n. 4.
2. *Pleading—misjoinder.* If a count against a party as guardian of a lunatic be joined with one against him in his own right, it is a misjoinder, and may be excepted to by demurrer, or in arrest of judgment. *Rodgers vs. Ellison*, 88, 90, 91.
See ACTION AND SUIT.

IMPUTABILITY CRIMINAL.

Conditions of criminal imputability, 280, 281.
See CRIMINAL LAW, 2.

INDEMNITY.

Equity will enjoin the enforcing of when, 256; 590, 594, 595.
See BOND, 1. LIEN. CHANCERY, 36.

INDICTMENT.

See CRIMINAL LAW, 19 to 25.

INFANT.

1. May elect, at majority, to take property purchased by his guardian with his money, or the money and interest. Election deliberately made binds him. *Caplinger vs. Stokes*, 175, 180.
See CHANCERY, 20, 21.
2. *Action by and against.* Where a *sci. fa.* is prosecuted against heirs, some of whom are infants, to subject lands descended to the satisfaction of the ancestor's debt, a general appearance thereto and demurrer by counsel for the defendants, cannot be regarded as an appearance for the infants: more especially, if the mandate be to make the writ known to the guardians. *Valentine vs. Cooley*, 613.
3. *Process void as to infants, only irregular as to adults joined therein.*—Though a *sci. fa.* be void as to infants for want of personal service, it will, on that account, only be irregular as to the adults joined therein with them; and a judgment and sale under it will stand till reversed as to the adults, and pass the title of their interest in the land. *Ibid.*

INJUNCTION.

1. To prevent the collection of a security given for a machine which proves to be unfit for its purpose, 155, 157; or given for the price of land when the vendor has not been evicted, 181, 186. Not granted in this case, unless fraud is alleged.
See BILL OF EXCHANGE AND PROMISSORY NOTE. CHANCERY, 17, 18, 19.
2. Not against indemnity bond, where the obligee has not been damnified, 590, 594, 596.
See BOND 1, 2, 3. CHANCERY, 36.

INTERPRETRATION.

1. The grammatical connection of words as relative and antecedent will not be allowed to prevail to the destruction of the meaning of the sentence. 232, 234, 235. *The State vs. Cherry*.
See CRIMINAL LAW, 86.
2. Where the interpretation of an instrument is rendered obscure by a conflict of its grammatical construction with its scope and purpose, resort may be had to extrinsic evidence to determine the sense. *Roberts on Frauds*, 26, 27. *Ibid.* 236.
3. *Rule for the construction of descriptive calls in grants and deeds.* The general and superior object cannot be defeated by a less general and inferior direction; and, in general, the higher prevails over the lower, the principal over the specific direction, 18 Am. Jurist, from Lieber's Political and Legal Hermeneutics. Note, 316.
4. Interpretation of *deeds*, when the *metes and bounds* are regarded as the superior object, and the *quantity* as the inferior and less general direction. *Ibid.* 316.

INTERNATIONAL LAW.

See CONFLICT OF LAWS. LIMITATION OF ACTIONS AND SUITS.

JUDGMENT.

1. State judgment, pleas to, and authentication of. *Estes vs. Kyle*, 34, 41, 43. See AUTHENTICATION. CONFLICT OF LAWS, 1.
2. *Res judicata*, effect of. *Ibid.* Note 43.
3. *Recite facts or reasons on which founded or not.* In the exercise of a special jurisdiction, if the proceeding is in the nature of a suit, and the

JUDGMENT—Continued.

order taken by the court is in the form of a judgment, it will be maintained, though the entry of the adjudication do not show that all the steps required by the act of Assembly were taken previously to the judgment. *Stewart vs. Miller & Moore*, 574, 576, 578.

See EMANCIPATION.

4. *Same.* Of inferior jurisdiction—bill of exceptions. The judgment of an inferior jurisdiction will not be reversed because the record does not show the evidence upon which it was founded. It will be presumed that there was sufficient evidence to support it. The want of evidence to sustain the judgment must be shown by a bill of exceptions. A note, though filed by the justice of the peace, is no part of the record till made so by bill of exceptions. *Union Bank vs. Lowe*, 225, 229, 231.

JURISDICTION.

1. See JUDGMENT. JUSTICE OF THE PEACE.
2. *Inferior Jurisdiction.* A justice is an inferior jurisdiction in the sense of the act of 1823, c. 54, § 3, authorising judgment on affirmance for 12½ per cent. per annum, in addition to the judgment of the inferior jurisdiction. *Union Bank vs. Lowe*, 225, 229, 231.
3. Justice of the peace has jurisdiction over corporations by summons. *Ibid.* 239.

JURY.

Challenge *propter affectum*, loose expressions of opinion, not a cause of. *Hoverton vs. The State*, 262, 263, 264. See CRIMINAL LAW, 16.

JUSTICE OF THE PEACE.

1. See JURISDICTION. JUDGMENT.
Jurisdiction extended, construction of law. By the act of 1837, c. 22, § 1, extending the jurisdiction of justices of the peace, their jurisdiction is confined to the case of a liability arising directly out of the instrument itself; and does not embrace an indirect, collateral or contingent liability, created not by the terms of the instrument, but by operation of law, as the liability of endorser, &c. *Mitchell vs. Miller*, 510, 511, 512.

LAND.

Entry of, occupied by another without notifying him, void. *Horn vs. Childress*, 102, 105.

What would be a waiver of notice, or not. *Ibid.* 104.

Entry and grant, partial invalidity of in this case. *Ibid.* 103, 105.

See GRANT.

LANDLORD AND TENANT.

1. *Landlord's lien on crop for rent.* Landlords, by virtue of the "lien on the crop growing on the rented premises," given by the act of 1825, c. 21, have no property in, or right to the crop, and can maintain no action grounded on any taking, or detaining of, or injury to it. *Hardeman vs. Shumate*, 398, 402, 403.
2. *Landlord's precedence of debt for rent, how secured.* The landlord's debt for rent is entitled to satisfaction out of the crop growing, &c., precedent to all other debts of the tenant; and this precedence is preserved by bringing suit for the debt, within three months after the rent falls due, and prosecuting it to judgment,—the lien of which judgment, and the execution thereon, takes date from the day the rent fell due. *Ibid.* 402.
3. *When tenant's possession becomes adverse.* To break the continuity of the landlord's possession held by tenant, and arrest the operation of the statute of limitations founded on such possession, the possession of his

LANDLORD AND TENANT—Continued.

tenants must have become adverse to him; and their possession becomes adverse from the time their attornment to another landlord is known to the first. *Ross vs. Blair*, 525, 545, 546.

LAPSE OF TIME.

When it is a bar to a specific performance. *Koen vs. White*, 358, 361, 362.
See CHANCERY, 6.

LARCENY.

See CRIMINAL LAW, 27.

LEASE.

By guardian of ward's land, omission of covenant against waste in, does not invalidate. *Ross vs. Blair*, 525, 545.
See GUARDIAN AND WARD, 3.

LEGACY.

Who takes? grandchild in *ventre matris*, when, *Smart vs. King*, 149, 153.
See CHANCERY, 40, Johnson's Digest, Chancery, 1192; Roper, c. 2, § 1,
3. Vested, favored in law. Indicia of. *Underwood vs. Dismukes*,
299, 306, 310. See CHANCERY, 40, 41, 42.

LEX DOMICILII.

Governs marital right to wife's movables, and acquisitions in the place of her residence. *McCollum vs. Smith*, 342, 352, 357. *Kneeland vs. Ensley*, 620, 627, 630.
See CONFLICT OF LAWS, 3 to 8. CHANCERY, 26, 27.

LEX LOCI CONTRACTUS.

Of marriage governs marital right in movables when neither party has any determinate domicil. *McCollum vs. Smith*, 342, 352, 357; *Kneeland vs. Ensley*, 620, 627, 630.
See CONFLICT OF LAWS, 3 to 8. CHANCERY, 26, 27.

LIEN.

1. Of vendor on sale of goods. *Gambling vs. Read*, 231, 234, 236.
See CHANCERY, 39. SALE, 7, 9.
2. *Landlord's for rent.* *Hardeman vs. Shumate*, 398, 402-3.
See LANDLORD AND TENANT, 1, 2.
3. Unaccompanied with possession, nature of considered in note to *Hardeman vs. Shumate*, 403.
4. *Of party against whom indemnity is taken.* If a surety, joint contractor, or assignor take from his co-surety, co-contractor, principal or assignee; an indemnity against his liability to the creditor, the creditor has no specific lien on the fund constituting the indemnity. *Molloy vs. Elam*, 590, 596. *Nashville Bank vs. Grundy & Hays*, 256.

LIMITATIONS OF ACTIONS AND SUITS.

1. *Lex Fori.* The statute of the state in whose courts a suit is prosecuted, must prevail in all actions. *Estes vs. Kyle*, 34, 41, 43.
See CONFLICT OF LAWS, 1.
2. *Claim to realty.* *Date of grant.* Grantee has cause of action from the date of his grant; and the time of prescription is to be counted from that period, and not from the registration. *Brown vs. Baldridge*, 1, 2, 3.
See GRANT.
3. *Same.* *Color of title void or voidable.* Seven years possession of land under a deed, though founded on a void, or voidable decree in chan-

LIMITATIONS OF ACTIONS AND SUITS—*Continued.*

cery, will perfect the title in the possessor. *Whiteside vs. Singleton*, 207, 224.

4. *Same.* Possession by husband's vendee of lands the joint property of him and his wife. In this case, the statute of limitations does not begin to run against the wife till her discoveriture, after which her title will be barred by the adverse possession of her husband's bargainee in seven and not in three years. *Miller vs. Miller*, 484, 496.

See HUSBAND AND WIFE. FEME COVERT. LANDLORD AND TENANT.

5. *Same.* Possession under a verbal purchase. A possession of land taken in consequence of a verbal sale is the possession of the vendor and under his title; but if a conveyance be made to the verbal vendee, he may couple his possession before and after the deed together, so as to gain the protection of the statute. *Valentine vs. Cooley*, 813.
6. *Against Executors and Administrators.* See that Title in this index.
7. Between ward and Guardian.

See GUARDIAN AND WARD. CHANCERY, 20, 21.

8. *Between bailor and bailee.* If on the marriage of a child, slaves be put by the father into his possession, without any expression of the father's purpose therein, it is to be regarded as a bailment and not a gift under the North Carolina act of 1806. And no length of possession will give the bailee title under the act of limitations. But, in such case, he may acquire title under that act, by afterwards assuming, with the father's knowledge, to hold them for himself; or by the father's treating the possession as the possession of the child, as by requesting the child to give the slaves to a grandchild; for, from hence it may be inferred that the transaction was a gift at first, or that a gift had been afterwards made. *McKisick vs. McKisick*, 427, 434, 436.

See GIFT.

9. *For penalties.* 31 Eliz., c. 5, § 5,—1829, c. 62, § 2. Actions for penalties where the recovery is for the government alone, must be prosecuted within two years after they shall have accrued. The statute of Elizabeth, so limiting those actions, is in force in Tennessee. *The State vs. Moore*, 476, 477, 478.

See PENALTY.

10. See the section of the statute of Elizabeth, note 478.
11. Between trustee and beneficiary, direct and implied trust.
See CHANCERY, 44, 54.
12. Equity of redemption.
See CHANCERY, 44.
13. Other equitable demands. Note, page 518.

LOTTERY.

See CHANCERY, 43. CONSTITUTIONAL LAW.

LOUISIANA.

Descent of movables and immovables in, *McCullom vs. Smith*, 342, 352, 357; *Kneeland vs. Ensley*, 620, 627, 630.

See CONFLICT OF LAWS, 3 to 8.

LUNATIC.

See IDIOT AND LUNATIC, 1, 2.

MAINTENANCE.

See CHAMPERTY.

MASTER IN CHANCERY.

1. Sale of lands by after *fiat* for writs of error and *supersedeas*, void.—*Claiborne vs. Crockett*, 607, 609, 612.
2. Effect of his deed made under a bare direction in a decree that he should make it. *Ibid.*
See CHANCERY, 16, 46, 47.

MILITIA DRILL.

Misfeasance to go through in the public squares and business resorts of towns and villages. *Childress vs. Yourie*, 561; 563, 564.
See CASE, ACTION OF.

MILL.

See WATERCOURSE.

MISFEASANCE.

Definition. The performance in an improper manner, place, or time of an act which it was a party's duty, contract, or right to do, is a misfeasance. *Chitty's General Practice*, 9. *Childress vs. Yourie*, 561, 563, 564.
See CASE, ACTION OF. 5, 6, 7.

MORTGAGE.

Rights and liability of mortgagor. Right of Redemption. Limitation.—Even in case of a direct trust, and in a suit between trustee and beneficiary, the statute of limitations may be a bar to the claim of the latter. But the relation of mortgagor and mortgagee is not that of trustee and beneficiary. It stands upon grounds peculiar to itself. The mortgagee has the right of possession, and it is for himself from the first. But the mortgagor's equity of redemption does not depend upon that possession, and cannot be affected by it, or barred by the continuance of it, under whatever circumstances or pretensions, short of the time when a presumption of right will arise. But if the mortgagee sell the property and convey it in fee, the purchaser, though at the time aware of the equity of redemption, will be protected by the statute; for, though notice of the equity fixes him with a trust for the mortgagor, it is not direct, but implied; and to enforce that species of trust, the beneficiary must sue within the time of limitation. For in such case the purchaser's possession is for himself, and his duty to the mortgagor does not arise out of the transaction whereby he acquired the possession, but is implied from the notice of his vendor's duty. *Wood vs. Jones*, 513, 516, 518.
See CHANCERY. Harrison's Digest, 1510, 1511.

NEW TRIAL.

1. *For what cause. Absence of evidence known at trial.* It is not error to refuse a new trial upon the plaintiff's affidavit of materiality of evidence known to him before the trial, or, if unknown to him, without the accompanying affidavit of the witness. *Cozart vs. Lisle*, 65, 67, 68.
2. *Same. Discovery of new evidence.* If an affidavit for new trial on the ground of newly discovered evidence, shows, that before the trial, due diligence was used to procure evidence of the fact expected to be proved by the newly discovered evidence, and the fact is material, it is error to refuse a new trial thereupon. *Potter vs. Coward*, 22, 25, 27.
3. *Same. Insufficiency of proof.* The court of errors will not set aside a verdict upon the ground merely of insufficiency of proof. *Angus vs. Dickerson*, 459, 469, 470.
4. *Same. Preponderance of proof.* The court of errors will set aside

NEW TRIAL.—Cont nued.

- verdicts approved by the circuit courts, in those cases only, where the weight of the testimony against the verdict greatly preponderates. *Yarborough vs. Abernathy*, 413, 418.
5. *Same. Verdict against evidence.* The court of errors will not grant a new trial if there be any proof by which the verdict can be sustained. *Dodge vs. Brittain*, 84, 85, 86. *Harrison's Digest*, 1525.
 6. *Same. Loose expressions of jurors as to prisoners guilt.* Loose impressions and conversations of a juror as to the prisoner's guilt or innocence, founded upon rumor, would not if disclosed by him or others to the court on the selection of the jury, have the effect to set him aside as incompetent; nor if disclosed after verdict, be a cause of new trial. *Howerton vs. The State*, 262, 263, 264.
 7. *Second New Trial.* If the facts submitted to a jury do not sustain the verdict, it will be set aside and a new trial granted; and the act of 1801, c. 6, § 59, which says that not more than two new trials shall be granted to the same party, does not prevent the court from granting new trials,—for error in the charge of the court to the jury; for error, in the admission or rejection of testimony; for misconduct of the jury, and the like. *Trott vs. West*, 163, 166.

NON EST FACTUM.

See **CRIMINAL LAW**, 39.

NONRESIDENT.

Bargainor, how deed may be proved. *Rochell vs. Benson*, 3. 6, 7.
See **DEED**.

NUISANCE.

See **CRIMINAL LAW**, 40, 41, 42. **WATERCOURSE**.

NON-SUIT AND NOLLE PROSEQUI.

The terms *non-suit* and *nolle prosequi* have long been confounded in Tennessee, and used as convertible. Since the act of 1801, c. 6, § 59, providing—"that every person desirous of suffering a non-suit on a trial at law, shall be barred therefrom, unless he do so before the jury retire from the bar"—the motion to take a *non-suit*, when made by a plaintiff, is equivalent to the motion to enter a *nolle prosequi*; and it is error to refuse the motion, though made after the evidence has been heard by the jury, and they have been charged by the court. Wherever at common law, the plaintiff could enter a *nolle prosequi*, he may, by our practice, under the act of 1801, enter a *non-suit*. See *Lee's Dictionary of Practice*, *Nolle prosequi*. *Partlow vs. Elliott*, 547, 549, 551.

NUL TIEL RECORD.

Plea of, only mode of questioning record. *Barkley vs. The State*, 93, 94.

See **CRIMINAL LAW**, 39.

PARAPHERNAL PROPERTY.

See *McCollum vs. Smith*, 342; *Kneeland vs. Ensley*, 620.

PARTNER.

Liability to others. Liability of one on consideration, when the other has contracted under seal. Where a contract which must, by law, be in writing, is made in writing under seal with one partner, who gives his bill single for the price of the thing purchased, the other partner cannot be sued upon the consideration. *Harris vs. Miller*, 158, 160, 161.

PENALTY.

Must be sued for in two years after it accrues, where the recovery is for the State alone. *The State vs. Moore*, 476, 477, 478, where see statute of Elizabeth.

See LIMITATION OF ACTIONS AND SUITS, 9, 10.

PLEADING.

1. *Parties. Tenants in common.* One tenant in common may sue in ejectment, or forcible entry and detainer without joining his co-tenant. *Turner vs. Lumbrick*, 7, 11.
See FORCIBLE ENTRY AND DETAINER,
2. *Same. Joint contractors.* All the joint owners of a fund must join in any action for its recovery; and each has a right to use the names of all the rest in bringing and prosecuting the suit. Therefore, though one be paid, he cannot, without the consent of all, withdraw his name or dismiss the suit, even as to himself; and if he be permitted to do it by the court it is error, because it defeats the action of which neither owner of the fund has exclusive control, having therein no separate interest. *Gray vs. Wilson*, 394, 397.
3. *Condition Precedent.* In a covenant to cut a certain number of cords of wood, at any place the covenantee sees proper, these latter words do not impose it on the covenantee, as a condition precedent, to seek the covenantor and give him notice of the place; and a plea of want of notice, not averring that the covenantor offered to commence the work and desired to be shown the place, and continued ready, &c. is bad upon demurrer. *Massey vs. Shields*, 78, 79.
See CONTRACT.
4. *Plea in bar must answer the whole gravamen.* A plea in bar pleaded to the whole declaration, must contain a sufficient answer in law to the whole gravamen, or cause of action: otherwise it is ill for the whole; and the plaintiff is entitled to recover for the whole. Gould's Pl., c. 6, § 98, and authorities there cited. *Reed vs. Moore*, 80, 81.
5. *When plea answers part only, how to except to it.* Where matter pleaded as an answer to the whole, is, in law, a good answer to *part only*, the proper mode of excepting to it is by *demurrer*. Gould, *loc. cit.*, § 104, sub-sec. 1; 1 Saund. 23. (n. 3.) *Ibid*, 80, 81. Harrison's Digest, 1628.
6. *Same. Usury.* Therefore, as a usurious contract is not void *in toto*, but only for the excess of usurious interest; if a defendant, who is sued on such contract, plead the usury as an answer to the whole demand, it is bad on general demurrer; and the plaintiff will be entitled to judgment on the whole. *Ibid*, 80, 81. Harrison's Digest, 2127.
7. *Joinder of counts. Misjoinder.* If a count against a party as guardian of a lunatic be joined with one against him in his own right, it is a misjoinder, and may be excepted to by demurrer, or in arrest of judgment. *Rogers vs. Ellison*, 89, 90, 91.
8. *Same. Counts requiring different pleas and judgments cannot be joined.* 1 Chitty's Pl. 208; 17 Johns. R. 117. *Angus vs. Dickerson*, 459, 466, 467.
9. *Counts in tort or contract.* When a contract creates the defendant's duties and obligations, and he is sued for a breach of them, whether counts assigning such breach, are in contract or in tort, depends upon their conclusion. *Ibid*, 466—7.
10. *Counts in tort.* A count ascribing to the defendant's mere negligence and carelessness, the loss of a negro, whom he, as hirer, was bound to re-deliver, is a count in *tort*, because the loss is laid to the want of care, not to the failure to re-deliver. *Ibid*, 466, 467.
11. *Rules to distinguish between counts in case ex contractu and ex delicto.*

PLEADING—Continued.

- In the *former*, the contract and its violation are the gist of the suit,—the injury sustained thereby is collateral thereto. In the *latter*, the wrong done, whether by misfeasance, malfeasance, or nonfeasance, is the gist of the action, the contract, collateral thereto. *Baxter & Hicks vs. Pope*, 467, in note. Harrison's Digest, 1611.
12. *Abatement plea in, judgment or demurrer to.* The judgment or demurrer to a plea in abatement is *respondens ouster*. It is error to render judgment final. *McBee vs. The State*, 122, 123, 124; *Eichorn vs. Le Maître*, 2 Wilson, 367; Harrison's Digest, 1639.
 13. *Repleader. Immaterial issue.* If an immaterial issue be submitted to a jury, and a verdict is rendered thereupon, final judgment cannot be pronounced upon the finding; but only a judgment of repleader. *Trott vs. West*, 163, 169.
 14. *Declaration. Demurrer.* If covenant be brought on a covenant of warranty in a deed, and it appears, on the face of the declaration, that the warrantor was out of possession, and that the land was adversely held, at the time of the warranty, a general demurrer to any pleading in the case will reach the declaration. *Williams vs. Hogan*, 180, 189.
 15. *Aider by verdict. Want of plea and issue not aided by verdict.* When there is no plea and no issue joined between the parties, the court has no power to empanel a jury; and if it do, and a verdict be found and judgment pronounced thereupon, the whole proceedings are null. The want of a *similiter*, but not of a plea, will be aided after verdict. *Mosley vs. Matthews*, 578, 579, 580; Harrison's Digest, 1642, 1643, 1644.
See ANCESTOR AND HEIR, 3. *House vs. Mitchell*, 138.

POSSESSION.

Statute of limitations. Possession taken under a verbal contract of sale may be coupled with possession under a conveyance so as to gain the protection of the statute. *Valentine vs. Cooley*, 613, 618, 619.

POWERS OF ATTORNEY.

When a power will be presumed to be duly proved. When the parties in equity, in their pleadings, treat a title as vested in one of them by virtue of a deed made under a power of attorney, which is not exhibited in their pleadings, the court will take it for granted that the power was well proved for the purpose of authorising the conveyance. *Claiborne vs. Crockett*, 607, 612.

PRACTICE.

1. *Process. Summons. In actions against heirs on covenant of warranty.* In an action against heirs on their ancestor's covenant of warranty, the original writ must be sent out against all, and if it be served on some, and returned *non est inventus* as to the others, the plaintiff must sue out an *alias* and *pluries* against those not served. *House vs. Mitchell*, 138, 140, 141, and note; Harrison's Digest, 1545.
2. *Summons. Distringas.* The process against corporations, as against other persons is *summons*, and not *distringas*. *Union Bank vs. Lowe*, 225, 229, 231.
See CORPORATION, Harrison's Digest, 1770.
3. *By whom process may be served.* A deputy sheriff may serve process issued by a justice. There is no law directly conferring the power, but the usage has long prevailed, and several statutes recognized it. 1794, c 1, § 52, 56; 1801, c 7, § 5; 1825, c 68, § 1; 1827, c 35, § 4. *Ibid.*, 230.
4. *Process against infants must be personally served.* Though a *sci. fa.*

PRACTICE—Continued.

- he void as to infants for want of personal service, it will, on that account, only be irregular as to the adults joined therein with them; and a judgment and sale under it will stand till reversed by the adults, and pass the title of their interest in the land. *Valentine vs. Cooley*, 613, 618, 619.
5. *Appearance—for infants.* Where a *sci. fa.* is prosecuted against heirs, some of whom are infants, to subject lands descended to the satisfaction of the creditors' debt, a general appearance thereto and demurrer by counsel for the defendants, cannot be regarded as an appearance for the infants; more especially if the mandate be to make it known to the guardians. *Ibid*, 613, 618, 619; Harrison's Digest. 1769, 1770.
 6. *Trial, putting off. Absence of witnesses.* It is not error to refuse a continuance, on an affidavit, stating the absence of witnesses summoned to prove the pendency of a prior suit for the same cause, the plaintiff releasing that suit of record. Nor is it error to refuse a continuance on an affidavit, stating the absence of witnesses summoned to support the character of the defendant's witnesses. *Turner vs. Lumbrick*, 7, 12, 13.
 7. *Same. Discretion of court.* Though the court of errors entertain a clear opinion that an affidavit offered in the circuit court for a continuance was sufficient, yet they will interfere with great caution and circumspection to control the discretion of the circuit judge. *Goodman vs. The State*, 196, 197.
See CRIMINAL LAW, 33.
 8. *Trial—conduct of cause.* Rules as to the order and conduct of trials may be inflexibly adhered to, or relaxed, according to the discretion of the presiding judge, and the circumstances of each case, so as thereby to attain, and not defeat the end of their adoption. *Cozart vs. Lisle*, 65, 67, 68.
 9. *Same. Same. Evidence closed—fresh proof.* The plaintiff's counsel having stated that his evidence was closed, and the defendant's, that none would be introduced on his side, it is not error to refuse the plaintiff leave to examine a witness summoned by, and attending on behalf of the defendant, however material his testimony. *Wills vs. Atcherson*, 12 Eng. Com. Law R. 125. *Ib.* 67, 68. And see *Giles vs. Powell*, 2 C. & P. 259, Harrison's Digest, 1790. Note, page 63.
 10. *Verdict, presumption in favor of.* Unless the bill of exceptions appear to contain all the evidence, or all the material evidence, it will be presumed that there was sufficient evidence to support it. *Trott vs. West*, 163, 168, 169.
See BILL OF EXCEPTIONS, 1, 2, 3.
 11. *Proceedings after verdict.* See NEW TRIAL. Harrison's Digest, 1525.
 12. *Judgment, arrest of, for what.* Not because the record does not show the evidence upon which it was founded. *Union Bank vs. Lowe*, 225, 229, 231.
See JUDGMENT, BILL OF EXCEPTIONS.
 13. *Bill of Exceptions.* See that title, and EVIDENCE.
 14. *Incidental proceedings. Amendment of justices record, entry of appeal.* The justices' omission to enter, and his mistake in entering a party's prayer for, and the grant of an appeal, may, on motion in the circuit court, be amended by the justice, by supplying or correcting the omitted or mistaken entry, by means of the recital in the appeal bond. But the recitals, *per se*, cannot be taken by the court above instead of the entry. These amendments are within the spirit and meaning, though not within the words of the act of 1821, c 21, § 1. *Lawler vs. Howard*, 15, 16.
 15. *Diminution.* *Certiorari*-awarded and diminution suggested after judg-

PRACTICE—Continued.

ment entered in the supreme court, the suggestion being supported by a copy of the record from the court below, showing the diminution. *Trott vs. West*, 163, 167, 168.

16. See NON-SUIT AND NOLLE PROSEQUI. APPEAL. CERTIORARI.

PRESENTMENT.

See CRIMINAL LAW, 19 to 25.

PRINCIPAL AND AGENT.

See AGENT AND PRINCIPAL.

PRINCIPAL AND SURETY.

See SURETY.

PROBATE.

See DEED. Mode of proving deed of non-resident, and certifying it *Re-chell vs. Benson*, 3, 4, 7.

PROCESS.

See PRACTICE, 1, 2, 3, 4.

PRO CONFESSO.

See CHANCERY, 45.

RECEIPT.

Consideration. A receipt given by a ward at majority to the guardian, acknowledging satisfaction in full of all demands on account of the guardianship, if the ward be a daughter, and under the father's control, will not be binding on the ward; and must be shown to have been supported by a consideration upon the ward's bill for an account in equity, *McCullum vs. Smith*, 342, 356, 357.

See CHANCERY, 2.

RECITALS.

In appeal bond, effect of. Not of themselves sufficient to amend the omission of the prayer for, and grant of appeal by justice. *Lawler vs. Howard*, 15, 16.

See PRACTICE, 9. APPEAL.

RECOGNIZANCE.

1. Taking and filing in court by justice makes it part of court's record. *Barkley vs. The State*, 93, 94. So filed cannot be questioned by *non est factum*. *Ib.*
2. Returned and filed by justices, and witnessed by them, sufficient evidence of being taken before them. *The State vs. Cherry*, 232, 236.
3. Taken by Sheriff from prisoner committed by magistrate because he did not know whether the offence was bailable or not, void. *The State vs. Horn*, 473, 475, 476.
4. See on all these point, CRIMINAL LAW, 36, 39.

RECORD.

1. To suit on State record, what pleas will lie. *Estes vs. Kyle*, 34, 41, 43.

See CONFLICT OF LAWS, 11. CONSTITUTIONAL LAW, 1.

2. Faith and credit to be given. *Ib.*

9. Evidence does not become part of, unless made so by bill of exceptions;

RECORD—Continued.

as note upon which suit before justice was prosecuted. *Union Bank vs. Lowe*, 225, 229.

REGISTRATION,

1. Of grant does not give it existence, but only preserves and perpetuates the evidence of its existence. *Brown vs. Baldrige*, 1, 2, 3.
2. Of deed of *non-resident* bargainor under act of 1807, c. 85, § 3. *Rochell vs. Benson*, 3, 4, 7; *Montgomery vs. Hobson*, 437, 455.
See GRANT, 1.
3. Irregular, effect of on party's title, and purchaser under it. *Rochell vs. Benson*, 3, 4, 7.
See DEED, 1, 2, 3.
4. Completes the title which was only inchoate by the signing, sealing and delivering. *Montgomery vs. Hobson*, 437, 448, 451.
See DEED, HUSBAND & WIFE, 4.
5. Date of, may be supplied by testimony of deputy register. *Miller vs. Estill*, 479, 483, 484.
See DEED, 5.

REMARKING.

See BOUNDARIES.

Quære whether the principle of it applies to *feme covert*. *Yarborough vs. Abernathy*, 413, 418.

RENT.

Landlord's lien for, how secured. *Hardeman vs. Shumate*, 398, 402.
See LANDLORD AND TENANT, 1, 2.

REPLEADER.

See PLEADING, 13.

RES JUDICATA.

Effect of. Note 43.
See JUDGMENT, 2.

RESPONDEAS OUSTER.

Is the Judgment on sustaining demurrer to a plea in abatement. *McBee vs. The State*, 122, 123.
See PLEADING, 12.

RETAILING LIQUORS.

Construction of the acts of Assembly relating to. *Dyer vs. The State*, 237, 247, 255,
See CRIMINAL LAW, 40, 41, 42.

SALE,**OF GOODS.**

1. *When complete.* A sale of chattels is complete so soon as both parties have agreed to the terms. So soon as the vendee says, "I will pay the price demanded," and the vendor says, "I will receive it," the vendee has a right to demand the thing sold,—the vendor to demand the consideration; and they are mutually entitled, the one to his action for thing, the other to his action for the money. *Potter vs. Coward*, 22, 25, 26.
2. *Same. Same. Sheriff's Sale.* *Shaw vs. Smith*, 9 Yerger, 97, recognized, which decides, that whatever property is vested in the Sheriff

SALE.—*Continued.*

- by his levy on a chattel, passes to the bidder at his sale, so soon as the hammer is down. *Ibid*, 46, 27.
3. *Same. Same. Conditional.* On a verbal sale with delivery, of a slave at a fixed price, to be paid on a day certain, but—*until paid, the title to remain in the seller*,—the payment is a condition precedent, till the performance of which, the property does not become absolute in the buyer, nor liable to his debts. *Gambling vs. Read*, 281, 284, 286.
 4. *Same. Conditional.* Upon the delivery of a chattel by A. to B. if an agreement be made between them—that the property shall remain in A, and the possession and use be enjoyed by B; and if, by a limited time, B do for A certain work, the property shall become B's—such agreement is legal. *Houston vs. Dyche*, 76, 77.
 5. *Same. Reservation of possession by vendor.* A reservation by the vendor with the buyer's consent, of the possession and use of articles absolutely sold, though they are consumable in the use, is only a badge of fraud. 3 Yerger 522; 4 *Id.* 541; 8 *Id.* 419. *Richmond vs. Crudup*, 581, 582, 584. *Vid. Assignment in Trust for Creditors.*
 6. *Same. In fraud of creditors.* *Banks vs. Thomas*, 28, 31, 33.
See FRAUDULENT CONVEYANCE.
 7. *Same. Seller's Lien.* Note to case of *Gambling vs. Read*, 286; *Harrison's Digest*, 1936.
 8. *Same. Unfitness for purpose.* A machinist in selling a worthless machine for a good one, is guilty of fraud, whether aware or ignorant of the defect. And in such case equity will enjoin the seller from collecting a negotiable security, executed for the price, and compel him to account for any part of the purchase money, paid to him or his *bona fide* assignee; but such assignee will not be enjoined from collecting it. *Donelson vs. Young*, 155, 157, and note *Harrison's Digest*, 1937, 1938.

OF LAND.

9. *Vendor's Lien passes to assignee of security given for price.* Unpaid purchase money secured by a mortgage of the property sold, or simply by a reservation of the title in the seller, draws after it, when assigned, the security provided for its payment. Hence in sales of land, where the vendor gives his bond for the title, and the purchaser his note for the money, an assignee of one of the notes may, without more, subject the estate to the payment; as he may also, in the case of a mortgage. But if the title passes out of the vendor by a conveyance unconditional, his equitable lien does not pass to an assignee of the purchase money. *Graham vs. McCampbell*, 52, 55, 58. Acc. as to this last point, *Gunn vs. Chester*, 5 Yerger, 205; *Contra, Kenny vs. Collins*, 4 Littell, 289. And see note, 58. *Harrison's Digest*, 1912.
10. *Same. What within Statute of Frauds.* A right of permanently overflowing the land of another, by a mill-dam to be constructed below his line is a hereditament; and a contract for the sale of it, must, therefore, be in writing. Acc. *Bridges vs. Purcell*, 1 Deveraux & Battle, 492. *Harris vs. Miller*, 158, 160, 161.
11. *Same. Same. Remarking* does not proceed upon the idea of a transmission of title, but upon that of ascertaining boundaries which are *unknown*; and though it have, in any case, the effect of changing the possession of any given land from one to another, it is not within the statute of frauds, because it is not a sale; but if the boundary be *known*, and the parties agree upon a new one, whereby there is a change of possession, that is void under the statute of frauds. *Yarborough vs. Abernathy*, 413, 418, 419.
See BOUNDARIES.
12. *Same. Same. Verbal agreement* A verbal agreement to receive real

SALE.—*Continued.*

- estate in discharge of debt, will not be taken out of the statute of frauds, by a submission to referees of the question—at what price it should be received—though the referees fix the price in writing under seal, and in the shape of an award. *Rice vs. Rawlings*, 496, 499, 502.
13. *Same. Same. Hereditament—Easment.* Note to *Harris vs. Miller*, 161, 162. *Harrison's Digest*, 1900, *et. seq.*
 14. *Of Land. Contract of Sale. Description of premises.* In a contract for the sale and purchase, at a gross sum, of a given number of acres—*off the west end of the vendor's tract to come to a road, thence in the direction of a certain fence, to a specified point*—the vendee will be entitled to the named quantity of acres, though not included between the west end of the tract, the road and the line, run thence to the point. *Sale of residue.* And the construction of the contract will be the same towards a subsequent contractor for the residue of the tract after the first vendee's purchase should be surveyee. *Harper vs. Lindsey*, 310, 314, 316. See **INTERPRETATION**. And see note, 316, for authorities upon the construction of *deeds*, where the *metes and bounds* are regarded as controlling the construction.
 15. *Some. Relation between vendor and vendee. Incumbrance on vendor's title.* The relation between the vendor and vendee is similar to that of landlord and tenant. Neither the vendee nor the tenant can do any thing in prejudice of the title under which they hold. Hence, if there be an incumbrance upon a vendor's title, or an adversary title, and it be extinguished by the vendee, it will enure to the benefit of the vendor, who will be bound to make an abatement in the purchase money equal to what it cost to clear the title. This is the result of the relation; and it follows whether the vendor had any title when he sold or not. See *Galloway vs. Finley*, 12 Peters 264,—opinion of CATRON, J., page 294. *Meadows vs. Hopkins*, 191, 183, 186.
 16. *Same.* By Clerk and Master under a decree in Chancery, after *fiat* for *writs of error and supersedeas* to reverse it,—void. *Claiborne vs. Crockett*, 607, 611.
See **CHANCERY**, 16, 48.

SCIRE FACIAS.

1. On a recognizance in state causes, plea of *non est factum* to recognizance demurable. *Barkley vs. The State*, 93, 94.
2. Allegation in, that recognizance was returned into clerk's office by justices, sufficiently certain allegation that it was taken before them. *The State vs. Cherry*, 232, 236. See **CRIMINAL LAW**, 36 to 39.
3. Though void as to infants for want of personal services is good as to adults, or only irregular. *Valentine vs. Cooley*, 613, 618. See **INFANT**, 3. **PRACTICE**, 4.

SEIZIN.

What necessary in ancestor to transmit the estate to heir by descent; or in wife, to make husband tenant by the curtesy. *Guion vs. Burton*, 570, 572. See **DESCENT**.

SHERIFF.

1. *Return not traversible.* No averment can be allowed against a sheriff's return. If untrue, the remedy is by action on the case for a false return. *McBee vs. The State*, 122, 123, 124. *Harrison's Digest*, 1981.
2. Process issued by justice may be served by deputy sheriff. *Union Bank vs. Lowe*, 225, 230.
See **PRACTICE**, 2.

SHERIFF—Continued.

3. *Bail*, in what cases sheriff may take. *The State vs. Hon*, 473, 475, 476. See **CRIMINAL LAW**, 1.
4. *Non return of execution*, may be moved against for, in Chancery Court. *Benson vs. Porter*, 519. Statutes upon construed, 520, 524.
5. *Competency of Sheriff to prove want of notice of sale*. The sheriff is competent, but not bound to give evidence of his own failure to give notice of the time and place of sale as required by the act of 1799, c. 14, § 1. *Valentine vs. Cooley*, 613, 618, 619

SLAVES AND SLAVERY.

1. Freedom, bequest of, to take effect after the death of testator's wife, with a contingent power of disposition by the wife in the mean time, construed favorably to the freedom. *Jacob vs. Sharp*, 114, 116, 119. Bequest to the same purpose without the contingent right of disposition. *Lavina vs. Duffield*, in note, 117.
See **FREEDOM**.
2. What disposition of a slave by a father to a child is a bailment or gift under the North Carolina act of 1806, Rev. c. 701, *McKissick vs. McKissick*, 427, 434, 436.
See **GIFT**, 1. **LIMITATION OF ACTIONS AND SUITS**, 8.
3. Emancipation of slaves under act of 1801, c. 27, good without chairman's report upon the petition. *Stewart vs. Miller & Moore*, 575, 578.
See **EMANCIPATION**.

SPECIFIC PERFORMANCE.

- Lapse of time when a bar to. *Koen vs. White*, 358, 363. Consideration may be enquired into or not, on bill for, brought by assignee of contract or title bond. *Thompson vs. Branch*. 390, 393, 394; *Koen vs. White*, 353, 363.
See **CHANCERY**, 3 to 8.

STATUTE OF FRAUDS.

1. English and Tennessee, difference in phraseology of. Note to *Harris vs. Miller*, 161, 162. See **SALE**, 10, 11, 12.
2. Avoids gifts of lands, &c., but not of money, stock, choses in action, &c. *Ewing vs. Cantrell*, 364, 373, 377. See **CHANCERY**, 12, 13, 14.
3. Award, what will or not take agreement out of. *Rice vs. Rawlings*, 496.
See **SALE**, 12.

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STATUTES.

1. Relate to their passage when signed by speakers. *Dyer vs. The State*, 237, 255.
2. Are not laws till signed by speakers 237, 255
When they take effect, note 255, 256.

SUBSTITUTION.

Principles of. Translation of texts of civil law. Note to *Scanland vs. Settle*, 173, 174, 175.
See SURETY, 3.

SUCCESSION.

Whether widow can claim collation of advancements. Under the North Carolina act of 1784, c 22, § 8, the widow of an intestate is not entitled to have advancements to his children in his life time collated, so as to form, out of the advancements and residue on hands at the death, a mass to be divided between her and the children. She is only entitled to a share of what remains after deducting the advancements. *Brunson vs. Brunson*, 630.

SUMMONS.

Corporation may be made liable by without *distringas*. *Union Bank vs. Lowe*, 225, 229, 230.

See CORPORATION, PRACTICE, 1, 2, 3, 4.

SURETY.

1. *Discharge of. Time given to principal. Taking addition security.* If a creditor take a deed of trust on his principal debtor's property—not stipulating to grant the debtor any delay, the taking of such additional security does not discharge the surety. But if the surety pay the money, he is entitled to be substituted in the creditor's place to the additional security. The surety will be discharged if the creditor has put it out of his power to make an assignment of the subsidiary security. *Story's Eq. § 502; Scanland vs. Settle*, 169, 171, 173.
2. *Sureties for successive appeals are not co-sureties.* If a judgment, rendered by the county court against two, is affirmed in the circuit court against them and their surety for the appeal,—and is again affirmed in the supreme court against the three and their surety for the second appeal,—the first and last sureties are related as principal and surety, not as co-sureties; and if the first pay the judgment, he is not entitled to contribution from the second. *Cowen vs. Duncan*, 470, 472.
3. *Right of, to be substituted to any security taken by the creditor. Texts of the civil law relating to.* Note to *Scanland vs. Settle*, 173, 174.

See CESSION OF ACTIONS.

TIME.

1. *Of prescription begins to run against grantee out of possession from the date of his grant.* *Brown vs. Baldrige*, 1, 2, 4; against the demand of ward against guardian from settlement between them. *Caplinger vs. Stokes*, 175, 180.
See GRANT, 1, 2; CHANCERY, 3, 4, 5.
2. *Lapse of when a bar to specific performance.* *Koen vs. White's Heirs*, 358, 363. How it affects equities of redemption. Note to *Wood vs. Jones*, 518.
See CHANCERY, 5.

TRESPASS.

1. No man shall be excused of, except it be adjudged utterly without his fault, and that he committed no negligence to give occasion to the hurt. *Weaver vs. Ward*, Hobart, 136. Note to *Childress vs. Yourie*, 564.
2. When the law authorises an act, and nothing is done but what is necessary to accomplish the act, those who perform it are not liable as trespassers. *Ibid*, 563.

TROVER.

1. *Conversion by conditional vendee and buyer from.* Upon the delivery of a chattel from A to B, if an agreement be made between them,—*"That the property shall remain in A, and the possession and use be enjoyed by B; and if by a limited time B do for A certain work, the*

TROVER—Continued.

property shall be B's—such agreement is legal. And, in such case, if B sell the chattel, he is guilty of a conversion; and so is the buyer from him if aware of the facts: and if not, when he is informed of them, he use the chattel, and say that A must look to B, that is a conversion, and a demand need not be proved. *Houston vs. Dyche*, 76, 77.

2. *Evidence in trover. Demand and refusal—conversion.* Where the right of property in a chattel is in one person, and the possession rightly in another—as by some species of bailment or the like—a demand will put an end to the possession; and in such case, refusal is evidence of conversion; but it is unnecessary either to make or to prove a demand and refusal, where there is other evidence of a conversion. *Ibid*, 77.
3. *Bailment. Hirer's responsibility. Changing service—conversion.* A hirer of a slave for a specific service is responsible for all damages arising from employing the slave in a different service; as he is also for a loss occurring while the slave is so employed, though the proximate cause of such loss was inevitable casualty. It is a fraud upon the rights of the owner, and a conversion to put a slave to a service entirely different from that for which he was hired. *Story's Bail*, § 413. *Angus vs. Dickerson*, 459, 466, 470.
See BAILMENT, 2, 3, 4.

TRUST.

1. Resulting or implied, how created. *Thompson vs. Branch*, 390, 393, 394.
2. Direct and implied, limitation of actions and suits as to. *Wood vs. Jones*, 513, 516, 518. And see the Note, 513.
See CHANCERY, 50 to 54.

USURY.

1. The contract being void only for the excessive interest, the usury must be pleaded in bar to so much and no more. *Reed vs. Moore*, 80, 81.
See PLEADING, 6.
2. Loan of depreciated notes to be repaid in *sound funds*, made to enable the borrower to pay a debt dollar for dollar, not usurious. *Burton vs. The School Commissioners*, 585, 590.
See CONSTITUTIONAL LAW, 16.

VENDOR AND PURCHASER.

1. Vendor's lien passes to an assignee of unpaid purchase money. *Graham vs. McCampbell*, 52, 55, 58.
2. But not after a conveyance in fee in Tennessee, *Ibid*. 55 to 58. Does in Kentucky. Note 58.
See SALE, 9.
3. Vendee is estopped to dispute the vendor's title. *Meadows vs. Hopkins*, 181, 186.
4. Fraudulent vendee, i. e. one who purchases after judgment against the vendor, cannot set up against a purchaser at a sale under an execution upon the judgment, an outstanding title. *Rochell vs. Benson*, 3, 4, 7.
See FRAUDULENT CONVEYANCE.
5. Purchaser from a vendor out of possession of land adversely held, cannot maintain against the vendor an action upon the covenant of warranty; for the deed and all the covenants are void. *Williams vs. Hogan*, 187, 189, 190.
See CHAMPERTY. COVENANT, 2.
6. Construction of *contract of sale* as to description of premises. *Harper vs. Lindsay*, 310, 316.
See SALE, 14.

VENDOR AND PURCHASER—Continued.

8. Possession of verbal vendee is possession of vendor. *Valentine vs. Cooley*, 613, 618, 619.

See LIMITATIONS OF ACTIONS AND SUITS, 5.

VERDICT.

1. Founded on immaterial issue, no judgment can be rendered upon. *Trott vs. West*, 163, 169. See PLEADING, 13.
2. Not sustained by evidence will be set aside. *Ibid.* 168, 169.
See NEW TRIAL, 35.
3. Will aid want of *similiter*, but not want of plea and issue. *Moseley vs. Matthews*, 578, 579, 580. See PLEADING, 15.

WARRANTY AND DECEIT.

Fraud. Mere false representation. A machinist in selling a worthless machine for a good one, is guilty of fraud, whether aware or ignorant of the defect. *Donelson vs. Clements*, 155, 157. *Harrison's Digest*, 2147, 2148.

See CHANCERY.

WATERCOURSE.

1. *Riparian owners, their rights as to backwater.* To cause the waters of a stream, by the erection of a dam or the like below a party's line, to overflow his grounds and springs; or, thereby to create, near his residence, ponds of stagnant and offensive water, injurious to health, is a nuisance, and an actionable injury. *Neal & Shelton vs. Henry*, 17, 20, 22.
3. Angell's work upon the subject. Note, page 21, 22, 161, 162.
4. *Right of flooding land above.* A right of permanently overflowing, the land of another, by a mill dam to be constructed below his line, is a hereditament; and a contract for the sale of it must, therefore, be in writing. *Harris vs. Miller*, 158, 160, 161. Acc. *Bridges vs. Purcell*, 1 Devereaux and Battle, 192.
See SALE, 10, 11, 12, 13. STATUTE OF FRAUDS.
5. On the subject of watercourses. See Note to *Harris & Miller*, 162.

WIDOW.

How her dower may be barred by testamentary provision. *Reid vs. Campbell*, 378, 385, 389. See CHANCERY, 28. DOWER.

Whether she may have advancements to children collated upon the distribution of the estate of her husband remaining on hand at his death intestate. *Brunson vs. Brunson*, 630. See SUCCESSION.

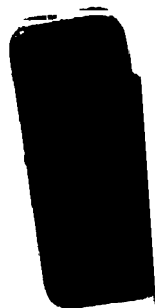
WILL.

Jurisdiction and Probate. How proved on issue, devisavit vel non? At common law, all the subscribing witnesses need not be called, unless it first appear that the instrument produced labors under doubt and suspicion. 1 Starkie's Ev. 320; 2 Id. 923; 6 Am. from 2d Lond. Ed. The act of 1789, c. 23, going upon the principle that the issue, *devisavit vel non?* implies doubt and suspicion, requires the party, in the first instance, to call all the living witnesses within the jurisdiction of the court; and that is the only change the act has made on the common law. Therefore, if the witnesses reside out of the jurisdiction of the court, proof of their handwriting is admissible, as it is at common law. 1 Stark. Ev. 325; 2 Dev. and Bat. 311. The proper officer's return on a *subpoena* for the witness is sufficient evidence of the fact, as was decided in *McDonald vs. McDonald*, 5 Yerger, 307; but it may also be shown by any other evidence tending to prove it. *Crockett vs. Crockett*, 95, 96, 97.

See EVIDENCE, 2, 3. DEVISAVIT VEL NON.

WITNESS.

1. *Competency. Of persons of mixed blood in criminal prosecutions, Jones vs. The State, 120, 122. See CRIMINAL LAW, 6.*
2. *Of grand juror on indictment against a witness examined before the grand jury for perjury committed in that examination. Crocker vs. The State, 127, 130, 131. See CRIMINAL LAW, 7.*
3. *Of bail or prosecution surety for party for whom they are bound, upon release and substitution of other surety. Craighead vs. The Bank, 199, 204, 206; Ross vs. Blair, 525, 544.*
4. *Of guardian who, having given bond to prosecute an action of ejectment in their names, is released when they come of age, and offered as a witness in for wards. Ross vs. Blair, Ibid. 544.*
5. *Of father for his own children in ejectment, where his wife having been entitled to dower in the land, they join in a relinquishment thereof to the children. Ibid. 544.*
6. *Of sheriff to prove want of notice of sale according to act of 1799, c. 14, § 1. Valentine, vs. Cooley, 613, 618, 619.*



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